21-475 April 15. 1875
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 227.

HARRY FOX, WILLIAM B. HOWARD, JOHN WHEAT, AND CLARKE SIPE, PLAINTIFFS IN ERROR,

vs.

EDWIN W. GARDNER, ASSIGNEE OF NICHOLAS YOUNG, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 11, 1873.

Oct. 2, 1873

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Harry Fox, William B. Howard, John Wheat, & Clarke Lipe, and Edwin W. Gardner, assignee in bankruptcy of Nicholas Young, a bankrupt, a manifest error hath happened, to the great damage of the said Harry Fox, William B. Howard, John Wheat, and Clark Lipe, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then & there held, that, the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right & according to the laws & customs of the United States, should be done.

Witness the Hon. Nathan Clifford, senior associate and Acting Chief Justice of the said Supreme Court, the 13th day of August, in the year of our Lord one thousand eight hundred & seventy-three.

[SEAL.] F. M. STEWART,
Clerk of Circuit Court of U. S. Western Dist. of Wisconsin.

S. U. PINNEY, *Att'y, Madison, Wis'n.*

The return to the within writ appears by the sc'edule hereto annexed.

The return of the judg' of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Madison, this 23rd day of August, A. D. 1873.

[SEAL.] F. M. STEWART, *Clerk.*

(Indorsed:) Supreme Court United States. Harry Fox et al., pl'ffs in error, vs. Edwin W. Gardner, assignee, &c., def't in error. Writ of error. Filed August 15, 1873. F. M. Stewart, cl'k. S. U. Pinney, att'y, Madison, Wis.

2 Circuit court of the United States of America for the western district of Wisconsin.

UNITED STATES OF AMERICA,
Western district of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the western district of Wisconsin, begun and held according to law, at the city of Madison, in said district, on the first Monday (being the second day) of June, A. D. 1873, and on the 15th day of said term, to wit, on the 18th day of June, A. D. 1873—present and presiding the Hon. David Davis, associate justice of the Supreme Court of the United States—among other the following proceedings were had to wit:

HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe, plaintiffs in error,
v.
EDWIN W. GARDNER, AS ASSIGNEE IN BANKRUPTCY of Nicholas Young.
} At law.

Be it remembered that heretofore, to wit, on the 18th day of April, A. D. 1873, came the above-named plaintiffs, by their attorneys, Messrs. Gregory and Pinney, and filed their writ of error to the district court as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the western district of Wisconsin, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said district court, before you, between Edwin W. Gardner, as assignee in bankruptcy of Nicholas Young, a bankrupt, and Harry Fox, William B. Howard, Clark Lipe, and John Wheat, a manifest error hath intervened to the great damage of the said Harry Fox, William B. Howard, Clark Lipe, and John Wheat, as by their complaint appears: We being willing that *his* error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the western district of Wisconsin, together with the writ, so that you may have the same at Madison, in said district, on the second day of June next, in the said circuit court to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 16th day of April, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] F. M. STEWART,
Clerk of the Circuit Court of the Western District of Wisconsin.

GREGORY & PINNEY, *att'ys for pl'ffs in error.*

Allowed by me.

J. C. HOPKINS, *Judge.*

The return to the within writ appears by the schedule hereto annexed.

The return of the judge of the district court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court, at my office in the city of Madison,
3 this 17th day of May, A. D. 1873, and of our Independence the ninety-seventh year.

[SEAL.] F. M. STEWART, *Clerk.*

Return.

District court of the United States of America for the western district of Wisconsin.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a special term of the district court of the United States of America

for the western district of Wisconsin, begun and held according to law at the city of Madison, in said district, on the third Tuesday (being the 18th day) of February, A. D. 1873—present and presiding the honorable James C. Hopkins, district judge—among other the following proceedings were bad, to wit:

EDWIN W. GARDNER, AS ASSIGNEE IN BANKRUPTCY of Nicholas Young,
vs.
HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe. } At law.

Be it remembered that heretofore, to wit, on the twelfth day of September, A. D. 1872, came the above-named plaintiff, by his attorney, W'm F. Vilas, and filed his præcipe for a summons for money demand against the above-named defendants, as follows, to wit:

Præcipe.

United States district court, western district of Wisconsin.

EDWIN W. GARDNER, AS ASSIGNEE IN BANKRUPTCY of Nicholas Young,
vs.
HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe.

Demand judgment for $5,640.18, with interest thereon at the rate of seven per cent. from the 15th day of December, A. D. 1870, less the sum of $527.16 paid thereon April 1, 1871.

F. M. STEWART, *Clerk.*

SIR: Issue summons in above-entitled action according to above directions.

Yours, &c.,

W'M F. VILAS,
Plaintiffs' Attorney.

Dated Sept. 10, 1872.

Whereupon a summons issued as follows, to wit:

Summons.

The district court of the United States for the western district of Wisconsin.

EDWIN W. GARDNER, AS ASSIGNEE IN BANKRUPTCY of Nicholas Young,
vs.
HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe. } Summons for money demand.

The United States of America to the above-named defendants:

You are hereby summoned and required to answer the complaint of Edwin W. Gardner, as assignee in bankruptcy of Nicholas Young, the plaintiff in this action, which will be filed in the office of the clerk of this court, at Madison, in said district. And you are also required to

file your answer thereto with the clerk of this court, at Madison, and to serve a copy thereof on the attorney of the plaintiff, whose name is subscribed hereto, at his office in Madison, Wisconsin, within twenty
4 days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of five thousand six hundred and forty dollars and eighteen cents, with interest at the rate of seven per cent. from the 15th day of December, in the year one thousand eight hundred and seventy, less the sum of $527.16 paid thereon April 1, 1871, besides the cost of this action.

Witness the honorable James C. Hopkins, judge of the said district court of the United States, at the city of Madison, in the said western district of Wisconsin, this 12th day of September, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] F. A. STEWART, *Clerk*,
By P. R. SANBORN, *Deputy*.

WM F. VILAS, *Plaintiff's Attorney*.

Summons returned.

"Served on the within-named Clark Lipe by delivering to him personally a copy of this summons this 12th day of September, A. D. 1872. The other defendants herein not found in my district.

"F. W. OAKLEY, *Marshal*."

And came the said plaintiff by his attorney, and filed his complaint as follows, to wit:

Complaint.

The district court of the United States for the western district of Wisconsin.

EDWIN W. GARDNER, AS ASSIGNEE IN BANKruptcy of Nicholas Young, a bankrupt, plaintiff,
vs.
HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe, defendants.

Edwin W. Gardner, an assignee of Nicholas Young, in bankruptcy, complains against Harry Fox, William B. Howard, John Wheat, and Clark Lipe, defendants in this suit, and alleges, on information and belief, that on the 7th day of January, 1871, James Seville and Thomas Albiston, partners, doing business at Lodi, Columbia County, in the State of Wisconsin, under the firm-name of Seville & Albiston, filed their petition in bankruptcy in due form of law in the said district court of the United States for the western district of Wisconsin against the said Nicholas Young, who was then a resident of said western district, and therewith due proof of their debt against said Young, and that said Young had committed an act of bankruptcy, reference to said petition and proofs, which the said plaintiff is ready to produce as the court shall direct, being had will more fully appear.

That thereupon such proceedings were had in said court that, on the 7th day of January, A. D. 1871, the said court duly made its order

thereon, whereby upon and in pursuance of said petition the said court duly adjudged the said Nicholas Young to be a bankrupt, and the first meeting of the creditors of said bankrupt appointed according to law; that, afterwards, and at said first meeting of the creditors, this plaintiff was, on the 6th day of February, A. D. 1871, duly elected assignee in bankruptcy of said bankrupt, and thereafter accepted said appointment and duly qualified as such according to law, and his said appointment was duly approved by the said district court.

And thereafter, on the 14th day of February, A. D. 1871, Sidney Foote, esq., register in bankruptcy, to whom the said matter was referred, executed in due form of law to this plaintiff an assignment of all the estate and effects, real and personal, of the said bankrupt, including all the property of whatever kind of which said bankrupt was possessed, or in which he was interested on the 7th day of January A. D. 1871, with all his deeds, books of account, and papers relating thereto, excepting such as was by law exempt, whereby this plaintiff became, was, and is, as such assignee, from which trust he has never been removed, entitled to have the several demands against the
5 said defendants hereinafter set forth.

The said plaintiff, in like manner, further alleges that, at all the several times herein alleged, the said defendants were, and for a long time thereafter continued to be, partners in business under the name and style of Fox & Howard, doing business under said firm-name, and in the names of said Harry Fox and William B. Howard, as such partners, and engaged as such in the construction of railroads, and especially in the construction of the road-bed of the Baraboo Air-Line Railroad Company, between the city of Madison and the village of Baraboo, in said western district, and were, during the several times hereinafter mentioned, actually engaged upon said work under a contract between said defendants and the Chicago and Northwestern Railway Company.

And the plaintiff, for a first cause of action, alleges that on or about the 4th day of October, A. D. 1870, the said defendants, by said Harry Fox and William B. Howard, and under their said firm-name of Fox and Howard, entered into a contract in writing with said bankrupt, a copy of which said contract is hereunto annexed and made a part of this complaint as if herein fully written, and whereby, among other things, said bankrupt agreed to do the grading for said defendants of that part of said railroad known as "section fourteen," being about one mile in length thereof; and also the necessary grubbing and clearing thereof; and the said defendants agreed to pay for the earth excavation done by said bankrupt thereunder the sum of twenty-two cents per cubic yard, payment for said work to be made to said bankrupt upon the monthly estimate of the engineer in charge of said work, on the 15th day of each and every month for the work done during the preceding month, reserving fifteen per centum until the completion of the work.

That, under said contract, the said bankrupt at once and on or about the 4th day of October, A. D. 1870, entered upon said work and completely performed all the same according to his contract, and the same was accepted by the defendants; that in the prosecution of said work it became necessary to excavate large quantities of rock, both solid rock and loose rock, so called; and the said defendants requested said bankrupt to perform said additional work, and promised said bankrupt to pay him therefor such price as the same should be rated at when classified and fixed under their, the said defendants', said contract with

the Chicago and Northwestern Railway Company; that, thereafter, such classification was made, and the rates fixed at one dollar per cubic yard for solid rock, and forty cents per cubic yard for loose rock; that, under said contract and said additional agreement, the said bankrupt excavated 87,997 cubic yards of earth, one hundred and ten (110) cubic yards of solid rock, and two hundred and fifty (250) cubic yards of loose rock, whereby the said defendants became indebted to said bankrupt, in all for said work, at the agreed rates aforesaid, in the sum of nineteen thousand five hundred and sixty-nine dollars and thirty-four cents, all of which became due and payable on the 15th day of December, A. D. 1870.

That, thereupon, they paid to said bankrupt on or before said day, the sum of fifteen thousand four hundred and eighty-five dollars and sixty-six cents, leaving due the sum of four thousand and eighty-three dollars and sixty-eight cents, and interest from the 15th day of December, A. D. 1870, thereon, upon which no payments were ever made to said bankrupt, but upon which they paid this plaintiff, on or about the first day of April, A. D. 1871, the sum of five hundred and twenty-seven dollars and sixteen cents, and that there remains justly due this plaintiff the sum of four thousand and eighty-three dollars and sixty-eight cents, with interest thereon from the 15th day of December, A. D. 1870, at seven per cent. per annum, less said sum of $527.16, paid April 1, 1871.

And for a second cause of action the plaintiff alleges that, referring to the foregoing statements for a showing of the work upon which said bankrupt was engaged for and by the said defendants, the said bankrupt did, at the special instance and request, and solely for
6 the benefit of the defendants, perform work and labor for them with his men and teams, in hauling one thousand cubic yards of earth upon section thirteen of said railroad, being the section thereof next adjacent to said section fourteen; and did also perform, at the like special instance and request, work and labor for the said defendasts in grubbing, clearing, and grading the depot-grounds for said railroad company's depot at the village of Lodi, in said western district, and in covering the same with gravel, said grounds being about 1,000 feet in length by 74 feet in breadth, all of which work was not within the contract set forth in said first cause of action, but outside thereof, and for which the said defendants promised to pay said bankrupt what the same should be reasonably worth; that the work in hauling said earth upon section thirteen aforesaid was reasonably worth the sum of one hundred dollars, and the work upon the said depot-grounds above stated was reasonably worth one thousand dollars, being in all the sum of eleven hundred dollars, which became due and payable on the 15th day of December, A. D. 1870; that no part of the same has ever been paid, although said defendants have been thereto often requested, but there now remains justly due this plaintiff thereon the said sum of eleven hundred dollars, with interest at the rate of seven per centum per annum from the said 15th day of December, A. D. 1870.

And for a third cause of action, this plaintiff alleges that on or about the 15th day of December, A. D. 1870, the said bankrupt furnished, sold, and delivered to the said defendants, as such partners as aforesaid, sundry tools and implements, goods, wares, and merchandise, and also performed and rendered by himself, his men and teams, work, labor, and services, as stated and set forth in detail in the annexed bill of particulars, which is hereby made a part of this complaint, and marked Schedule A. That the said tools and implements, goods,

wares, and merchandise, work, labor, and services mentioned and set forth in said annexed bill of particulars were reasonably worth, and the defendants agreed to pay said bankrupt therefor, the several sums set opposite the several items therein charged for respectively, in all the sum of four hundred and fifty-six and $\frac{50}{100}$ dollars; and thereby said defendants became indebted to said bankrupt on the said 15th day of December, A. D. 1870, in said sum; but although thereto often requested, they have not paid the same nor any part thereof, but there now remains justly due this plaintiff thereon, the sum of four hundred and fifty-six and $\frac{50}{100}$ dollars and interest thereon from the 15th day of December, A. D. 1870.

Wherefore, this plaintiff prays judgment against said defendants for the said several sums aforesaid, amounting in all to the sum of five thousand six hundred and forty dollars and eighteen cents, with interest thereon at the rate of seven per centum per annum since the 15th day of December, A. D. 1870, less the sum of five hundred and twenty-seven and $\frac{16}{100}$ dollars paid thereon April 1, 1871, as aforesaid, besides the costs of this action.

WM F. VILAS,
Attorney for Plaintiff.

This agreement, made and entered into this fourth day of October, A. D. 1870, by and between Harry Fox and William B. Howard, comprising the firm of Fox & Howard, party of the first part, and Nicholas Young, party of the second part, witnesseth:

That for and in consideration of the covenants and agreements hereinafter mentioned, to be done and performed by the said party of the first part, the said party of the second part covenants and agrees with the said party of the first part to do and complete all the grading, grubbing, and clearing which said party of the first part may require on section fourteen (14) of the Baraboo Air-Line Railroad, the same being a line of railroad running from the city of Madison, Dane County, in the State of Wisconsin, the grading to be done in the following manner, viz: All cuts to be taken out to a width of seventeen feet at grade, with side slopes of one and one-half feet horizontal to one foot vertical, and ditches at the bottom not less than one and one-
7 half feet deep; all embankments to be completed to a width of fourteen (14) feet on the top, with side slopes one and one-half feet horizontal to one foot vertical; the grubbing and clearing to be done according to and under the direction of the engineer of said road. All of said work, and each and every part thereof, to be done in a good and workmanlike manner, and to the satisfaction of the engineer of said road, and to be completed on or before the fifteenth day of December next. In all matters of dispute arising between the parties hereto, in reference to said work, the decision of the engineer shall be binding and final with both parties.

And it is further agreed and understood by and between the parties hereto, that in the event said work is not progressing to the satisfaction of the said party of the first part, they, the said party of the first part, shall have the right to declare the whole, or such portion of this contract as they may elect, null and void, and shall have the right in such case to re-let the whole or such portions of said work, or make such other disposition thereof as to them may seem proper. All the extra expense occasioned by a failure on the part of the party of the second part to perform the covenant herein contained to the satisfaction of the party of the first part, to be borne by the said second party.

And the said party of the first part covenants and agrees to pay said party of the second part for said work, as follows, viz: For earth excavations the sum of twenty-two (22) cents per cubic yard, payment for said work to the said party of the second part to be made upon the monthly estimate of the engineer in charge of said work, on the fifteenth day of each and every month, for the work done during the preceeding month, reserving fifteen per centum from each estimate until the completion of said work, and fulfilment of this contract; said payment to be made as follows: To the laborers employed in doing said work to the extent of the amount ascertained to be due them for such services, and the balance of such estimate to be paid to the said party of the second part.

In witness whereof the said parties hereto have hereunto subscribed their names on the day and year above mentioned.

FOX & HOWARD.
Per R. HILL.
N. YOUNG.

Signed in duplicate in presence of—
WM J. WALTON.

SCHEDULE A.

LODI, *Nov.* 29, 1870.

Messrs. Fox and Howard to N. Young, Dr:

Nov.	10.	To 1 dozen pick-axes @ 25 c	$3 00
Nov.	12.	To ½-dozen pick-handles @ 25 cts	1 50
Nov.	14.	To ½-dozen sledge handles @ 25 cts	1 50
Nov.	23.	To 9 shovels	11 25
Nov.	23.	To 500 feet fuse	7 50
Nov.	24.	To 1 drill and 1 spoon	8 75
Nov.	25.	To 3 shovels	3 75
Nov.	25.	To 500 feet of fuse	7 50
Nov.	25.	To 1 keg powder	5 00
Nov.	28.	To 3 pick-handles	75
Nov.	28.	To 1 keg powder	5 00
Nov.	28.	To 30 shovels	37 50
Nov.	29.	To 1 dozen shovels	15 00
Nov.	29.	To 1 dozen pick-handles	3 00
Nov.	29.	To ½ keg powder	2 50
Nov.	29.	To 100 feet fuse	15 00
Oct.	8.	To hauling lumber 4 days at $4.00	16 00
Oct.	8.	To 3 drills	24 00
Oct.	8.	To 1 keg powder	5 00
Oct.	8.	To some fuse, 1 drill	8 00
Oct.	8.	To hauling timber and work on grade	275 00
			$456 50

And came the defendants, by their attorneys, Messrs. Gregory and Pinney, and filed their answer in said entitled cause, as follows, to wit:

District court of the United States for the western district of Wisconsin.

EDWIN W. GARDNER, ASSIGNEE, &C., }
vs. }
HARRY FOX, ET AL. }

First. The above-name defendants, in answer to the plaintiff's complaint, allege that at the time of the commencement of this action there was, and now is, another action pending in the circuit court of the State of Wisconsin in and for the county of Dane, in said State, between the same parties as this action, and for the same causes as those set forth in the complaint herein.

Second. And the said defendants, for a further separate defence to this action, deny each and every matter and thing in said complaint stated and contained and not hereinafter expressly admitted. They admit that they are and were partners doing business under the firm-name and style of Fox & Howard, and as such had a contract with the Chicago and Northwestern Railway Company for grading the roadbed of the railway from the city of Madison, in Dane County, to the village of Baraboo, in Sauk County, Wisconsin, and have been engaged in and about the same, the work being in part done by their employés, and in part by sub-contractors under these defendants. And these defendants admit that they entered into a contract in writing, with one Nicholas Young, in said complaint mentioned, on or about the 4th day of October, A. D. 1870, for grading section fourteen of said railway, and also to do the grubbing and clearing thereon that might be required of him by the defendants under said contract; a copy of which contract is annexed to the complaint in this action, and to which these defendants refer, and make the same and all and singular its provisions a part of this their answer, in the same manner as though it was incorporated and written herein in words and figures at length.

And these defendants further say that they were each and all of them interested in said contract, and it was in fact made for the benefit of each and all of them equally, as such partners as aforesaid; that under and in pursuance of said contract, the said Young did excavate, as was estimated and determined by the engineer in charge of said work, and referred to in said contract, including the work done on the depot grounds at Lodi, and on section fourteen aforesaid, 87,997 cubic yards of earth excavation, and no more; and three hundred and sixty cubic yards of rock, and no more; the same being boulders on and in said work; and they deny that said Young performed any extra work for said defendants, as claimed in said complaint, and aver that the entire amount of work performed by said Young for them, and all the work for which claim is made by the plaintiff in this action, was done and performed under and in pursuance of the provisions of said contract, except as hereinafter stated; and the amount and character and classification of the same was estimated and determined by the said engineer in charge of said work, as is hereinbefore stated, and as provided in said contract, and amounted, according to said contract price, to the sum of nineteen thousand five hundred and sixty-nine dollars and thirty-four cents.

And the said defendants deny that said Young performed any work for these defendants outside of said contract, or upon any other terms than is therein specified and provided, except some hauling of timber

and other work claimed in and by the third count of said complaint to have been done by the said Young for these defendants.

And the said defendants, as to the second count or cause of action set forth in said complaint, allege that the work and labor therein charged for was done and performed upon the terms and conditions contained in said written contract, and under the same, and the amount
9 thereof was ascertained and estimated by the engineer in charge of the work on said road, as hereinbefore stated, and paid for accordingly, at twenty-two cents per cubic yard, which is all said work is reasonably worth.

And the said defendants, as to the third count or cause of action stated in said complaint, allege and show that the tools, implements, goods, wares, and merchandise, and the labor and services therein specified, and had and received by these defendants, amounted to and were reasonably worth the sum of three hundred and seventy-two dollars and seventy-five cents, and no more, which sum these defendants have paid, as hereinafter stated; and they deny that said tools and implements, goods, wares, and merchandise, and labor, and services, were sold and delivered, done, and performed to the extent, quality, and amoun tstated in said third cause of action, and the bill of particulars annexed to said complaint and therein referred to.

And the said defendants, further answering, allege that the goods, wares, tools, & implements, &c., sold and delivered by the said Young to these defendants, and all the work and labor performed by him under and by virtue of the terms of said contract, or otherwise, amounted according to said contract, and the estimate so made as aforesaid, and as agreed on between said Young and these defendants, to the sum of nineteen thousand nine hundred and forty-two dollars and nine cents, and no more; that these defendants paid to the said Young, and to and for his use and at his request, and in tools and supplies furnished him before he was adjudged a bankrupt, and before his bankruptcy, the sum in all of nineteen thousand three hundred and four dollars and forty-six cents; and that after said bankruptcy they paid on account of such dealings and demands, the entire balance due thereon to the said plaintiff, as assignee of said Young in bankruptcy, being the sum of five hundred and twenty-seven dollars and sixteen cents, excepting the sum of one hundred and eleven dollars and forty-seven cents, reserved by them under said contract to pay unpaid laborers for the work and labor performed on said work under said Young, and which they have since then paid out accordingly.

Wherefore the defendants pray judgment for their costs and disbursements in this action.

GREGORY & PINNEY,
Defendant's Attorneys.

And now, at the same term, to wit, February special term, A. D. 1873, and on the eleventh day thereof, to wit, on the first day of March, A. D. 1873, the following proceedings were had, to wit:

Trial and verdict.

EDWIN W. GARDNER, AS ASSIGNEE OF Nicholas Young, a bankrupt, *vs.* HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe.	At law.

This day came the parties to this suit, with their respective counsel,

and the issue herein came on to be tried, whereupon a jury was ordered to come, who came, to wit: Thomas Daley, Daniel Coon, C. H. Parker, T. E. Bird, Ira Isham, John Ellis, A. J. Berzontee, G. A. Barber, A. Wilcox, J. E. Baker, Thomas Weir, and G. A. Newton, twelve honest and lawful men of the district, who were all duly elected, tried, and sworn to well and truly try said issue, and after hearing the evidence and the arguments of counsel, and receiving the instructions of the court, the jurors of the jury aforesaid, upon their oaths do say that they find the issue herein in favor of the plaintiff, and assess his damages at the sum of four thousand six hundred and ninety-one dollars and forty-seven cents. And thereupon the defendants, by their attorneys, moved the court for a new trial herein. And on their further motion, it is ordered by the court that the defendants have until the second Tuesday of April next ensuing, in which to settle and file their bill of exceptions herein, and that entry of judgment may be stayed until that time.

And afterwards, to wit, on the 20th day of said term, to wit, on the 8th day of April, A. D. 1873, the following proceedings were had:

EDWIN W. GARDNER, AS ASSIGNEE OF NICHOLAS Young, a bankrupt, *vs.* HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe. } At law.

This day came the defendants by their attorneys, and on their motion it is ordered by the court that the said defendants have ten additional days to file their bill of exceptions.

And afterwards, to wit, on the twenty-third day of said term, to wit, on the 11th day of April, A. D. 1873, the following proceedings were had.

Judgment.

EDWIN W. GARDNER, AS ASSIGNEE OF NICHOLAS Young, a bankrupt, *vs.* HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe. } At law.

This day came the defendants by their attorneys, and on their motion it is ordered by the court that the motion for a new trial herein be withdrawn. Whereupon it is considered and adjudged by the court that the plaintiff do have and recover of the defendants Harry Fox, William B. Howard, John Wheat, and Clark Lipe, the said sum of four thousand six hundred and ninety-one dollars and forty-seven cents, so as aforesaid assessed by the jury, with two hundred and eighteen dollars and eighty-one cents, his costs about his said suit in this behalf expended. On hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of Exceptions.

District court of the United States, for the western district of Wisconsin.

EDWIN W. GARDNER, AS ASSIGNEE IN BANKRUPTCY of Nicholas Young, a bankrupt,
vs.
HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe.

Be it remembered that afterwards, to wit, at a term of the district court aforesaid held at the United States court-house in the city of Madison, in and for said district, on the 18th day of February, A. D. 1873, to wit, on the 3rd day of March, A. D. 1873, in the same term, before Hon. James C. Hopkins, district judge and judge of said court, the aforesaid issues so joined between the said parties as aforesaid, came on to be tried by a jury for that purpose duly empanneled and sworn to try the same; at which time and place came the said plaintiff, as well as the said defendants, by their respective attorneys aforesaid, and the jurors of the jury aforesaid empanneled to try the said issues being called, also came, and were then and there in due manner chosen and sworn to try the said issues. The plaintiff upon his part gave evidence showing that the petition of Nicholas Young's creditors was filed against him in bankruptcy in the district court of the United States for the western district of Wisconsin, on the 7th day of January, A. D. 1871; that there was on the same day issued the usual preliminary injunction against him and David N. Burroughs and James McCloud and the defendants, which was served on all but the defendants; that on the 17th day of January, A. D. 1871, said Young was duly adjudicated a bankrupt by said court; that plaintiff was duly elected assignee by Young's creditors, and was confirmed by the court, accepted, and gave bond as required by law; and that on the 14th day of February an assignment, in all respects legal and regular, of the bankrupt's effects and estate was made to the plaintiff. And further gave evidence tending to prove the second and third causes of action stated in the complaint and rested.

11 And the defendants to maintain and prove said issues on their part, then proved payment to said Young prior to the filing of the petition in bankruptcy, by payment to his laborers under the contract set forth and annexed to the pleadings, and to himself the sum of $15,485.66, and since the appointment of the plaintiff as assignee the payment to him of $527.16, being the same payments admitted in the complaint; and also gave evidence tending to show that $111.47 was retained by the defendants to pay to laborers on the work, who were not paid to that amount, and that it was reserved by them for unpaid labor. And also gave evidence tending to show that they had paid said Young the further sum of $125.00 by furnishing him with certain supplies and tools before the petition in bankruptcy was filed; and they also gave evidence tending to disprove the second and third causes of action stated in the complaint; and also gave in evidence the original orders, acceptances, and endorsements thereon, of which the following are true copies.

"$826.42. "LODI, *December 3d*, 1870.

Messrs. FOX & HOWARD: Please pay the bearer, D. N. Burroughs, eight hundred and twenty-six dollars and forty-two cents for goods in October and November, payable on the 15th day of December next, and charge the same to

"N. YOUNG, *Contr.*
"Per B. O. ULSRUD.

(Endorsed.) "Accepted and promised to be paid out of any money in our hands after payment of laborers lien and orders previously accepted.
"Dec. 7th, 1870. "FOX & HOWARD.
"Per W. J. WALTON.

[50 ct. stamp, cancelled.]

"Internal revenue stamp to amount of fifty cents affixed to this instrument and cancelled by me at the request of D. N. Burroughs, this 23rd day of February, A. D. 1871, and penalty remitted.
"B. M. COATES,
"*Col. 3rd District, Wis.*"

"$997.52.

Messrs. FOX & HOWARD: Please pay to Messrs Pruyn and Son nine hundred and ninety-seven dollars and fifty-two cents for goods in October and November, and charge the same to
"N. YOUNG, *Contr.*
"Per B. O. ULSRUD.

"Accepted and promised to be paid out of any money due N. Young in our hands after payment of laborer's lien and orders previously accepted. Done this 1st day of December, at 8 o'clock, p. m.
"FOX AND HOWARD.
"Per W. J. WALTON.

["Cancelled stamp, 50c.]

"Internal revenue stamp to the amount of fifty-cents affixed to this instrument, and cancelled by me at the request of James McCloud, this 23d day of February, A. D. 1871; penalty remitted.
"B. M. COATES,
"*Coll'r 3d Dist., Wisconsin.*

("Endorsed.) Pay to James McCloud, or order the within order.
"Dec. 28, '70.
"PRUYIN & SON."

"LODI, *Dec.* 1, 1870.

"Messrs. FOX & HOWARD, *Lodi, Wisconsin:*

"GENTLEMEN: Please pay to Mr. E. Knuteson the sum of one thousand sixty-five and $\frac{14}{100}$ dollars, being amount of my account, and charge the same to
"Yours respectfully,
"N. YOUNG.

"Accepted and promised to be paid out of any moneys in our hands due or belonging to Mr. N. Young, after the payment of laborer's lien in our hands and orders previously accepted.
"FOX & HOWARD.
"Dec. 1, 1870. "Per WM. J. WALTON.

["Cancelled stamp 55c.]

"Internal revenue stamps to the amount of fifty-five cents, affixed to this instrument and cancelled by me at the request of D. N. Burroughs, this 23d day of February, A. D. 1871; penalty remitted.
12 "B. M. COATES,
"*Coll'r 3d Dist., Wis.*

("Endorsed Dec. 1, '70.) Please pay to D. N. Burroughs without recourse.
"E. KNUTESON."

"$270.36. LODI, *Dec'b'r 3d*, 1870.

"Messrs. FOX & HOWARD: Please pay the bearer, James McCloud, for goods in October, November, and work with team, to amount of two hundred and seventy dollars and thirty-six cents, payable on the 15th of December next, and charge the same to

"N. YOUNG, *Cont'r*,
"Per B. O. ULSRUD."

[Stamps cancelled, 15 cents.]

"Internal-revenue stamps to amount of fifteen cents affixed to this instrument, and cancelled by me this 23d day of February, A. D. 1871; penalty remitted.

"B. M. COATES,
"*Coll'r 3d Dist. Wis.*"

(Endorsed:) "Accepted and promised to be paid out of any money in our hands belonging to N. Young, after payment of laborers' lien and orders previously accepted.

"FOX & HOWARD,
"Per W. J. WALTON.

"DEC. 3D, 1870."

These orders, it was admitted, were drawn on the days of their date, respectively, by said Young, or by his authority. And the defendants then gave evidence tending to show that they were severally accepted by them, by said Walton as their agent, on the days of the several dates, respectively, of said written acceptances thereon, and were received by the several payees thereof in payment of their several debts against Young.

And the said E. KNUTESON, being called as a witness for the defendants, and having testified in chief to his having obtained his said order and procured its acceptance by defendants, and that he had sold and endorsed the same without recourse to said D. N. Burroughs within one week thereafter, was, on cross-examination, asked by the plaintiff's counsel the following question: What was Young's reputation for solvency in the latter part of November, and on the first day of December, 1870? Defendants' counsel objected to the question, being a calling for matters which were incompetent and irrelevant, and inadmissable under the pleadings, and for that as to the defendants the said transactions could not be impeached or questioned as being in contravention of the bankrupt act, and for that the same was not proper cross-examination; but the court overruled said objections, and permitted the witness to answer said question, to which said ruling and decision counsel for defendants' did then and there except. (1st exception.) And thereupon the said witness answered as follows: "I heard rumors about the last of November or first of December, to the effect that Young was short, and was not going to be able to pay his debts. I knew that several merchants had not got their pay on their October orders, which were due and payable in the usual course of business on the 15th of November, 1870. I went to Mr. Young just as he was getting ready to go to Chicago, and told him that there were rumors that he was not going to be able to pay, and he said that his estimate was not satisfactory, and that I should keep quiet, and that he would make it all right in Chicago. I think there was a good deal of talk about Young's solvency while he was gone to Chicago. Some thought it would be all right, and some thought differently.

The defendants called W'M J. WALTON as a witness, and he, being sworn, testified among other things in relation to the acceptance of said orders by said defendants at the time said acceptances were dated, and upon his cross-examination the plaintiff's counsel asked him the following question: "Did not the defendants pay Young the fifteen per cent. reservation on this October estimate, because they knew he was distressed for money and unable to make his payments?" And he then proposed to follow this question by testimony that Young was insolvent, and that the defendants accepted these orders with full knowledge that they were intended to defraud the other creditors, and that they
13 had not in fact paid the acceptances, and to show that the defendants colluded with Young and these creditors to enable them to get a preference contrary to the bankrupt law. The counsel for defendants objected to said question being answered, and also objected to said proposed testimony being given as not being proper cross-examination, and as calling for and giving matters in evidence which were inadmissable under the pleadings, there being no allegations therein charging fraud, or that any act had been done by the defendants or others in contravention of the bankrupt law, and for that said testimony would be incompetent and irrelevant, and that said acceptances and payments could not as to the defendants be questioned or impeached as being in contravention of the bankrupt law; but the court overruled said objections, and permitted said witness to answer said question, to which said ruling and decision counsel for the defendants did then and there except, (2d exception,) and did then and there decide that said proposed testimony would be and was competent and proper testimony in the cause, to which said ruling and decision counsel for the defendants did then and there except, (3d exception.) And thereupon said witness answered said question as follows: "The fifteen per cent. reservation on the October estimate was paid to Young on the night we paid his October pay-roll, which was November 18, 1870, to enable him to pay up board bills, &c., for which he was pressed. This was the fifteen per cent. which Fox & Howard were authorized to retain until completion of the work." And subject to said objections and under said ruling and exception last named, the court permitted said witness to testify to divers matters and things tending to show that Young was insolvent at the time of said transactions, and that the defendants and the payees of said acceptances had good reason to believe him insolvent, and that he had not property and means sufficient to pay all his debts in full, and tending to show that the said payees knew, and the said defendants had good cause to believe that said acceptances were intended to secure to them, said payees, a preference over the rest of Young's creditors.

ROYAL HILL being called as a witness for defendants, and having testified, among other things, that he was the general agent and manager of the defendants in the work of constructing the railroad mentioned in the pleadings, and that he had given to D. N. Burroughs and James McCloud verbal assurances that if, for any account which they should have against said Young, in taking his orders upon either of them given to his men, they would obtain Young's order on the defendants at the end of each month therefor, they would accept and pay the same, was, on cross-examination, asked by the plaintiff's counsel the following question: "Did you not know or understand that Young was insolvent or bankrupt before the first of December, 1870, and at and about the time he finished his work?" Defendants' counsel objected to the question as calling for matters not proper on cross-examination and not admissable under the pleadings, there being no allegation therein charging

fraud, &c., and for that the matters inquired after were incompetent and irrelevant; but the court overruled said objections and allowed said witness to answer said question, to which ruling counsel for the defendants did then and there except. (4th exception.) The witness then answered as follows: "Nothing came to my knowledge leading me to suppose Young was bankrupt or insolvent before he got his final estimate. We got knowledge of the fact that Young was not going to be able to pay, a week or eight days after he finished his work. I heard whisperings about Young being insolvent before we got the final estimate. We did not get the final estimate before Dec. 8th, and perhaps later, and until then we had no reliable information. And the defendants gave further evidence tending to show that Young commenced work under said contract about the first of October, 1870, and finished the same on the 24th of November; that in the early part of October they gave to said Burroughs and to said McCloud, who were merchants in Lodi, verbal assurances that if they should sell to said Young, upon his
14 order to his laborers for goods, such orders being in character like the one hereto annexed, marked "Exhibit B," and should obtain from Young at the end of each month of his work an order by him on defendants for the amount of such several orders in gross, they would accept and pay the same, so far as they had money of his in their hands, or owed him; that such orders for the month of October were obtained from Young, but not accepted or paid by defendants; and that further like accounts were incurred during the month of November; and on the 28th of that month defendants sent word to said Burroughs and McCloud, severally, to bring up such orders and have them charged to Young, and they did bring their several orders of said Young in favor of divers laborers upon said Burroughs and McCloud, and the amounts thereof were to said Burroughs $826.42, and to said McCloud, $278.36; and the same were then charged up to said Young by defendants on their book, being a memorandum book of their clerk, Mr. Walton, (with other orders,) as follows, to wit:

"NICHOLAS YOUNG,	DR.
"Nov. 28. To Burroughs' orders	$826 42
"Nov. 28. To McCloud's orders	278 00
"Dec. 1. To Pruyn & Sons' order	997 60
"Dec. 1. To E. Knuteson's order	1,067 00
"Dec. 1. To Burroughs' orders	523 78
("Items for tools, &c., charged Young preceed these entries to the amount of)	107 50
"Amount	$3,800 30
"Dec. 1, by amount charged to balance	$3,800 30

That afterwards, at defendants' request, the said Burroughs and McCloud procured of said Young said orders given in evidence above, and the same were accepted by the defendants, and on the 4th of December, 1870, were charged up to Young on defendants' books, at their office, at Madison, as acceptances, as follows, to wit:

"N. Young, to company acceptances, $3,692.80.

"First, to conditional acceptance of J. Pruyn & Son, $997.60; also, conditional acceptance of E. Knuteson, $1,067.00, which acceptances are rendered conditional by the following endorsements:

"Accepted and promised to be paid out of any money in our hands be-

longing to N. Young, after the payment of laborers' liens and orders previously accepted."

"To bona-fide acceptance of D. N. Burroughs, $1,350.20; and to bona-fide acceptance of J. McCloud, $278.00."

It was here admitted that said Young was indebted to said Burroughs, McCloud, Pruyn & Son, and E. Knuteson, at the dates of said orders respectively, in the several amounts thereof. And defendants also gave evidence tending to prove that Pruyn & Son about December 28, 1870, sold and endorsed their order to McCloud for $600.00, the amount for which it was sold being given in evidence on cross-examination of defendants' witness, against their objection that it was incompetent evidence, as was the case in regard to the price for which the Knuteson order was sold to Burroughs; but in each case the court ruled the evidence was competent, and admitted the same, to which ruling counsel for the defendants did then and there except. (5th exception.) And defendants also gave evidence tending to prove that the Pruyn & Son and Knuteson orders were given for the aggregates of several small orders, drawn on them respectively, by Young and in favor of his laborers and boarding-house keepers who boarded them, and tending to prove that said orders and acceptances of them by defendants were taken and received by them in payment of their debts against Young specified in said orders.

JOEL PRUYN, a member of the firm of Pruyn & Son, merchants at Lodi, was called and sworn by defendants, and testified to procuring of the order on defendants in their favor from Young, and in relation to its acceptance by defendants, December 1, 1870, and on his cross-examination plaintiff's counsel asked said witness: "At and shortly before the time you got your order accepted, what was your understanding, upon public rumor, of Young's solvency?" Defendants counsel objected to the question on the ground that it called for matters which were immaterial, irrelevant and incompetent, and inadmissable under the pleadings, no allegations being contained therein charging any act to have been done contrary to the bankrupt law, and for that as to the defendants, the transactions relied on by them, as payments could not be questioned or impeached as being in contravention of the bankrupt law. The court overruled said objections and allowed the witness to answer, to which ruling and decision counsel for the defendants did then and there except. (6th exception.) And thereupon the witness answered as follows:

"I can't say whether it was before or after I got it that I learned of Young's insolvency, but I think I was skittish of Young all the time."

The defendant's counsel offered and read in evidence a petition signed and sworn to by the plaintiff, and which was filed in the district court of the United States for the western district of Wisconsin, in the matter of Nicholas Young in bankruptcy, on the 28th day of March, 1871, against the said D. N. Burroughs, a copy of which is hereto annexed and made a part of this bill, marked "Exhibit A."

And the defendants also gave in evidence the following orders, called elsewhere in the bill boarding-house orders, and endorsements thereon:

"$30.00. LODI, *December 2d*, 1870.

"Messrs. FOX & HOWARD: Please pay to J. A. Collins, for board in November, thirty dollars, payable on the 15th of December next, and charge the same to

"N. YOUNG, *Contractor.*
"Per B. O. ULSRUD."

Upon the back of which paper-writing appeared the following endorsement:

"Pay D. N. Burroughs: J. A. COLLINS."

Upon the margin of such paper writing is the following:

"Internal-revenue stamp to amount of five cents affixed to this instrument and cancelled by me, at the request of D. N. Burroughs, this 23d day of February, A. D. 1871. Penalty remitted.

"B. M. COATES,
"*Coll'r 3d Dist., Wis.*"

"$69.00. NOVEMBER 30, 1870.

"N. YOUNG, *Contractor:* Please pay to D. N. Burroughs sixty-nine dollars, or as much thereof as there is coming to me, and deduct from my account.

["Stamped.] "HENRY SLOSSER."

Upon the margin of which paper is the following endorsement:

"Internal-revenue stamp to amount of five cents affixed to this instrument, and cancelled by me at the request of D. N. Burroughs, this 23d day of February, A. D. 1871. Penalty remitted.

"B. M. COATES,
"*Coll'r 3d Dist., Wis.*

"Mr. N. YOUNG: Please pay D. N. Burroughs, or bearer, fifty-one and $\frac{50}{100}$ dollars, being amount of board-bill for the month of November, and oblige,

"N. P. BUNNELL."

Upon the margin of which paper is the following endorsement:

"Internal-revenue stamp to the amount of five cents affixed to this instrument and cancelled by me at the request of D. N. Burroughs, this 23d day of February, A. D. 1871. Penalty remitted.

"B. M. COATES,
"*Coll'r 3d Dist., Wis.*

"$151.27. LODI, *November* 30, 1870.

"N. YOUNG, *Contractor:* Please pay to D. N. Burroughs one hundred and fifty-one $\frac{27}{100}$ dollars, or so much thereof as there is coming to me, and deduct the same from my account, and this shall be your receipt.

["Stamped.] "M. COSSETT."

Upon the margin of which paper appears the following endorsement:

"Internal-revenue stamps to the amount of ten cents affixed to this instrument, and cancelled by me, at the request of D. N. Burroughs, this 25d day of February, A. D. 1871. Penalty remitted.

"B. M. COATES,
"*Coll'r 3d Dist., Wis.*

16 "$129.54. LODI, *November 30th*, 1870.

"N. YOUNG, *Contractor:* Please pay to D. N. Burroughs one hundred and twenty-nine $\frac{54}{100}$ dollars, or as much thereof as there is coming to me, and deduct the same from my account, and this shall be your receipt.

[Stamped.] "WELSCOME S. NOTT."

Upon the margin of which paper appears the following:

"Internal-revenue stamps to amount of ten cents affixed to this instrument, and cancelled by me at the request of D. N. Burroughs, this 23d day of February, A. D. 1871. Penalty remitted.

"B. M. COATES,
"*Coll. 3d Dist., Wis.*"

"$70.89. LODI, *November* 30, 1870.

"N. YOUNG, *Contractor:* Please pay to D. N. Burroughs seventy $\frac{89}{100}$ dollars, or as much thereof as there is coming to me, and deduct the same from my account, and this shall be your receipt.

[Stamped.] "ERNEST KLEBBER."

Upon the margin of which paper writing appears the following:

"Internal-revenue stamp to the amount of five cents affixed to this instrument, and cancelled by me at the request of D. N. Burroughs, this 23d day of February, A. D. 1871. Penalty remitted.

"B. M. COATES,
"*Coll. 3d Dist., Wis.*"

It was conceded by the plaintiff that at the several dates thereof said Young was indebted to Collins, the payee of the first, and to the drawers of the others of said last-named orders in the several sums of the said several orders respectively. And thereupon the defendants gave evidence tending to prove that said Cossett, Klebber, and Nott, intended by such orders to assign their said claims against Young to said D. N. Burroughs, and also evidence tending to prove that on the first day of December, 1870, said orders were charged up to said Young on the memorandum-book of their clerk, Walton, and afterwards, on the 4th of December, on their books at Madison, as a part of the acceptance of D. N. Burroughs of $1,350.20, and that within a few days after the first of December said defendants notified said Young thereof, and he consented thereto, and it was admitted that the said acceptances to McCloud, and Pruyn and Son, the latter having been endorsed to McCloud, as before stated, had not been paid by defendants. And the defendants also gave evidence tending to prove that on the 28th of February, 1871, they sold to D. N. Burroughs a stock of merchandise to the inventoried and agreed value of $3,327.08, and received of him in part payment therefor the said acceptance to said Burroughs and to E. Knuteson (endorsed and sold to Burroughs by Knuteson as before stated,) and the six boarding-house orders hereinbefore mentioned and charged up to Young, amounting to $2,393.76, taking a note for the balance of $933.32, (which was paid the following May,) and that at the time of the sale the said Burroughs gave to said defendants a bond or agreement of indemnity against plaintiff's claim; and after producing other testimony in support of their defense, the defendants rested their case.

And the plaintiff upon his part then gave evidence tending to prove that the defendants had not delivered the shovels and tools charged for as claimed by them in their claim of payments thereby to the amount of $125.00, and tending to show that they were not entitled to credit therefor as a payment, and also tending to show that no laborer under the contract with Young remained unpaid, and that none was entitled to demand said $111.47, or any part of it, of defendants. And subject to the objections to such testimony and evidence made in due season by the defendant's counsel to each and every part thereof, that the same

was incompetent and inadmissable under the pleadings, there being no allegations therein that any act had been done by the defendants or others, fraudulently or in contravention of the bankrupt law; and that said several transactions relied on by them as payments as aforesaid could not be questioned or impeached as being in contravention of the bankrupt law, and under the ruling and decision of said court that such testimony and evidence was *was* competent and proper to be
17 given to said jury; to which ruling and decision the defendants, by their counsel, in due time and season did then and there except. (7th exception.) The plaintiff gave evidence tending to prove that at the several times when each of said orders to Burroughs, Knuteson, McCloud, and Pruyn and Son, which were accepted in writing, were drawn by said Young, the said Nicholas Young was actually insolvent, and did not have or possess property of any and every kind sufficient to pay his debts, but had suffered great and to him ruinous losses in the performance of his said contract with defendants, and tending to prove that such condition of insolvency was know' to each of said payees in said acceptances at the time the said orders were made by said Young, and tending to prove that such condition of insolvency was likewise known to said defendants at the time when they severally made such acceptances; and also tending to prove that on the 28th of November, 1870, when as they claimed and gave testimony tending to prove, they charged up to said Young, and credited to Burroughs and McCloud the amount of the several small orders of Nicholas Young which they had taken; they had the like knowledge, and also testimony tending to prove that it was likewise known to defendants, or that they had reasonable cause to believe that at the time said orders were drawn by Young, and said acceptances were made by defendants the said several payees in them named, and who procured such acceptances, had knowledge or sufficient notice, and reasonable cause to know of said Young's insolvency; and also tending to prove that such acceptances were made by the defendants in collusion with the several payees, and especially with said Burroughs and said McCloud to assist them to obtain a preference over the other creditors of said Young; and tending to prove that such orders and acceptances, both on the part of the bankrupt and of his creditors, the said several payees thereof and of the defendants, were made in fraud of the provisions of the bankrupt act, (as construed and applied to this court in its rulings and charge to the jury,) contained in this bill; and also gave evidence tending to prove the same facts in all respects as applicable to said Young, said Burroughs and the defendants, in respect to the six other orders called the boarding-house orders, amounting to $502.20, which the defendants claimed, and had given evidence tending to prove, were charged to Young, and credited to acceptances by the defendants on the 4th of December, 1870, under the date of Nov. 30, 1870, and to which Young has assented; and also gave evidence tending to show that Young was, at the time said several orders were drawn, indebted largely to other merchants in Lodi, who are now creditors of his estate, and that all such indebtedness was made and contracted by delivering goods to the laborers of said Young under his contract with the defendants, upon the written orders of said Young, in form similar to the order annexed and marked Exhibit B, and of the same character with the debts of said D. N. Burroughs, E. Knuteson, James McCloud, and Pruyn and Son; and tending to show that a son-in-law of Mr. Hill, the general agent of defendants, about the time of Burroughs buying the Knuteson order and acceptance, lent the said Burroughs $500 00; and also proved by evidence that at the time

when the defendants paid said acceptances to Burroughs by the transfer of said merchandise to him, they knew of the bankruptcy proceedings, and of the plaintiff's appointment as assignee, and that he insisted upon his claim against them presented by this action.

And the plaintiff further gave evidence, which was not objected to by defendants, tending to show, among other things, that said Young had never given any consent to have said six boarding-house orders charged up to him by defendants, and had never verbally or in writing accepted any of said orders, or directed them to be paid by defendants; and tending to show that said boarding-house orders were not so charged up as claimed by defendants, nor at the time claimed, and that one of the boarding-house orders was not assigned to said Burroughs absolutely, but for collection only, if it could be brought about.

18 And the said plaintiff's counsel read in evidence the following receipt, given by defendants to McCloud, to wit:

"Received of James McCloud two accepted orders, one in favor of Pruyn & Son, $997.52, and one in favor of James McCloud for the sum of $270.36; said orders to remain in our hands, subject to the order of McCloud, until such time as we can pay the same by due course of authority of law.

"FOX & HOWARD.
"Per W. J. WALTON."

And the plaintiff's counsel offered in evidence the agreement or bond of indemnity given by said Burroughs to defendants when they sold said merchandise and paid said acceptances held by him as before mentioned, which is in the words and figures following to wit:

"I do hereby agree with Messrs Fox & Howard, that through the payment to me of certain accepted orders drawn by N. Young on Fox & Howard, and accepted by them, I will, in the event that the assignee of said Young can, by due course of law, compel and oblige them, said Fox & Howard, to pay the same to the credit of said N. Young's creditors, to indemnify and protect them against a repayment of the same; the aggregate sum of said accepted orders being twenty-three hundred and ninety-three $\frac{76}{100}$ dollars; five hundred and two $\frac{20}{100}$ dollars of said sum, being orders drawn on said Young by sundry persons, and accepted by Fox & Howard.

["Stamped.]

"D. N. BURROUGHS.

"MERRIMACK, WIS., *February* 28, 1871."

To the reading of which evidence, counsel for the defendants did then and there object, for that the same was immaterial and incompetent evidence, and not admissable under the pleadings. But the court then and there overruled said objections and admitted said agreement in evidence, and the same was read accordingly; to which said ruling and decision counsel for the defendants did then and there except. (8th exception.)

And the defendants, to rebut said matters, so produced and given in evidence on the part of said plaintiff, and to maintain said issues on their part, gave evidence tending to prove that they did not know, and had not reasonable cause to believe said Young was insolvent when they accepted said orders and charged the same and said boarding-house orders to said Young, and that the several payees thereof had no such knowledge, or reasonable cause; and also tending to prove that they had no reason or motive for accepting said orders, and charging the

same and said six boarding-house orders to said Young with his assent, as claimed by them, and in making said payments insisted on by them, except to pay and discharge their debt to said Young in such manner as was satisfactory to the said Young; and gave testimony tending to rebut and disprove all testimony and evidence offered, given, and relied on by said plaintiff to impeach or render invalid said orders and acceptances, and other matters relied on by defendants as valid payments of their debt to said Young, and tending to prove that such transactions, orders, and acceptances were not fraudulent as to them, nor in fraud of the bankrupt law.

And thereupon after the testimony was closed, the counsel for the defendants moved and requested the court to exclude from the consideration of the jury, and to instruct them to disregard all testimony given before them bearing upon or tending to establish the following points, to wit:

First. Whether at the time of making the several acceptances and payments relied on by the defendants, said Nicholas Young was insolvent.

Second. Whether D. A. Burroughs, Pruyn and Son, E. Knuteson, James McCloud, or the defendants, either knew or had good reason to believe said Young at the time aforesaid was insolvent, and generally to exclude from the consideration of the jury, and to direct them to disregard all testimony relied on by the plaintiffs to show that those transactions in question, or either of them, were in contravention of the bankrupt law. But the court then and there overruled and denied said motion and request, to which ruling and decision counsel for the defendants did then and there except. (9th exception.) And thereupon the cause was argued by counsel for the respective parties before the court and jury.

19 Whereupon counsel for the defendants did then and there ask said court to instruct said jury as follows:

"The contract provides, as follows: 'Said payments to be made as follows: To the laborers employed in doing said work to the extent of the amount ascertained to be due them for such services, and the balance of such estimate to be paid to the said party of the second part.' By this clause Fox & Howard became liable to pay the laborers of Young on this work for their services to the extent of the estimates made for such work by the engineer, and the contractor, Young, has claim only to the balance of the estimates after such payments to the laborers. If, therefore, the jury find that Fox & Howard had paid all the laborers upon said work, the amount of such payments must be deducted from the amount of the final estimate, and neither Young or the assignee in this case can claim anything except the balance after such payment; or if the laborers have not been paid in full by Fox & Howard, or Young, for any balance for labor now due Fox & Howard are still indebted, not to Young or the assignee, but to such laborers.

"If the entire debt claimed in this action consists only of the claims of laborers for their services upon the work, the plaintiff cannot recover, and if any portion of the claim of the plaintiff consists of the claims of laborers, to that extent the plaintiff cannot recover.

"By this agreement Fox & Howard have not agreed to pay Young for the services of laborers upon the work, and are not bound to pay Young such claims, and did not and do not owe Young anything on such account, but they have agreed and are bound to pay the laborers.

"If Fox & Howard have paid laborers either directly to laborers themselves, or by accepting and paying their orders or time-tickets, or caused them to be paid in any other way, the amount so paid must be deducted

from the whole estimates, and Young or his assignee, are only entitled to the balance.

"For laborers' services Fox & Howard did not become indebted to Young, but to the laborers themselves, and for such indebtedness neither Young nor the assignee can recover."

Said court then and there gave said propositions in charge to said jury as the law of the case, except the last one thereof, which it refused, with the following qualification thereof to wit: "These are given with the qualifications contained in my general charge, except the last, and with the further addition that if Young has paid the laborers he can recover the amount paid of Fox & Howard, not exceeding the estimates, and that there is nothing in the contract to prevent his paying all of them, and that Young is liable directly to all the laborers. And, further, that Young's order to a laborer upon a third party to pay the laborer a certain sum of his labor upon his account, does not authorize the party accepting and paying such order to collect the amount of Fox & Howard."

The portions of the general charge so referred to are hereinafter set forth.

To which said qualifications of said propositions so given in charge to said jury, as well as the refusal of said court to give said last proposition in charge to said jury, the said defendants did then and there except. (10th exception.)

The defendants further requested said court to then and there charge said jury, among other things, as follows:

"The plaintiff is not entitled upon the facts proved to recover of the defendants the amount of money retained by them, $111.47 to pay unpaid labor, as the defendants are still liable to the person to whom it is due and have a right to retain it to make such payments as provided in the written contract under which the work was done."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (11th exception.)

The defendant's counsel further requested said court to then and there charge said jury, among other things, as follows:

20 "The remainder of the payments claimed by defendants consist of the acceptances charged against Young on the books of the defendants, and papers relating to which have been given in evidence before you, amounting in all to $3,692.80, of which sum all except $523,28, is embraced in the four acceptances in writing, as follows:

"Dec. 7. To D. N. Burroughs for	$826 42
"Dec. 3. To James McCloud for	270 36
"Dec. 1. To E. Knuteson, for	1,065 14
"Dec. 1. To Pruyn & Son, for	997 52

"The sum of $523.28 consists of what are called boarding-house orders, drawn in favor of Burroughs, and which, it is claimed by the defendants, Burroughs owned, and that he took them for value, under an understanding with the defendants that they would pay them and charge them to Young, and it being conceded that they were drawn for actual debts due from Young. If you find that Burroughs purchased them with that understanding, and presented them to the defendants for payment, and that Young directed such payment to be made, and that they be charged to his account, and they were so charged, then the defendants became debtors to Burroughs for the amount of such debts, and were bound to pay the amount to Burroughs; and if this transac-

tion took place, as above stated, before the petition in bankruptcy was filed. (January 7, 1871,) then the plaintiff cannot recover for the amount represented by these boarding-house orders, and the defendants are entitled to that amount as a credit in this action."

The said court then and there refused to instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (12th exception.)

The defendants further requested said court then and there to charge said jury, among other things, as follows:

"If you find that the orders given by Young to Pruyn & Son, Knuteson, Burroughs, and McCloud, and accepted in writing by the defendants, were given for actual debts, and if you find that they were so accepted before January 7, 1871, (the date of the filing of the petition in bankruptcy,) by the defendants in the terms endorsed on each of them respectively, then the defendants became bound to pay an amount of their indebtedness to Young equal to the amount of these orders to the holders of the same, it being a conceded fact that there was a sufficient sum coming from them to Young for this purpose by the 15th of Dec., 1870; and whether actual payment has been made to the holders of these acceptances or not, the plaintiff cannot recover in this action any portion of said indebtedness so agreed to be paid to the several payees of said acceptances."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (13th exception.)

The defendants further requested said court to then and there charge the jury, among other things, as follows:

"If you find that these orders, or any of them, were drawn and accepted in writing before the petition in bankruptcy was filed, then, to the extent of the orders so accepted, Fox & Howard became the debtors of the person or persons to whom such acceptances were given, and are not liable to pay the sums embraced in them to the plaintiff, even though Young was then insolvent to the knowledge of Fox & Howard and the person or persons so obtaining such acceptances."

The court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (14th exception.)

The defendants further requested said court to then and there charge said jury, among other things, as follows:

"The defendants had a right to pay their debt to Young or to his creditors, by his direction, even though he was then insolvent to the knowledge of all the parties to such transaction and the result would be to make such payments fraudulent preferences as to the persons receiving the same, and the orders and acceptances given in this case are not void or in contravention of the bankrupt act, as between the plaintiff and these defendants; and if given and accepted before the filing of the petition in bankruptcy against Young, then the same are a bar to
21 a recovery in this action to the extent of the amount embraced in them."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (15th exception.)

The defendants' counsel further requested said court to then and there charge said jury, among other things, as follows:

"If you find that the orders and acceptances were, as to the persons obtaining them, fraudulent preferences, within the meaning of the bank-

rupt act, then the plaintiff, as assignee, has no right of action or remedy against any one but the person or persons who so obtained the same, or are benefited thereby. Any payment of the acceptances by the defendants, after the bankruptcy proceedings were instituted, would discharge the defendants to the extent of the sum thus paid, and the plaintiff would have no remedy against the defendants by reason thereof."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (16th exception.)

The defendants' counsel further requested said court to then and there charge said jury, among other things, as follows:

"If the defendants gave their acceptances to Young's creditors at his request, as between Young and the plaintiff, standing in his place, and the defendants, the transaction amounted to a payment, and neither Young nor the plaintiff can recover against them without first taking up and surrendering to the defendants such acceptances; and in any view which the jury may take of the facts and circumstances of this case, the only remedy which the plaintiff had or has is to recover from the holders of the acceptances the unpaid acceptances and the proceeds of such as have been paid, from the parties receiving the same or benefited thereby. If they were given and accepted for the purpose of binding the defendants to pay a corresponding portion of what they owed Young to his creditors, to whom they were given, and this took place before the filing of the petition in bankruptcy, then the plaintiff cannot recover against the defendants the amounts embraced in such acceptances, and they should be allowed as credits to them in this action."

The said court did then and there refuse to so instruct said jury, to which said refusal the defendants' counsel then and there excepted. (17th exception.)

The defendants' counsel further requested said court to then and there charge said jury, among other things, as follows:

"As to the order given Pruyn & Son, and accepted by the defendants, if you find that they took such order and acceptance as payment of their debt against Young, or made no claim against him thereafter for the same, and did not notify him that they would hold him liable by reason of the acceptance being partial or conditional, or if they afterwards transferred the same, without recourse, to a third party, for value, in either case their debt, as against Young, was paid and extinguished, and the debt thereafter became solely that *that* of Fox & Howard to the holder of such order, and the transaction would operate as a payment by Fox & Howard to Pruyn & Son for the use of Young; and if these transactions took place before the filing of the petition in bankruptcy against Young, then the plaintiff cannot recover against the defendants in this action any sum on account thereof, or on account of the indebtedness to Young, for which they gave such acceptances."

The said court then and there refused to so instruct said jury, to which said refusal the defendants' counsel then and there excepted. (18th exception.)

The defendants' counsel further requested said court then and there to instruct said jury, among other things, as follows:

"As to the order given to Knuteson, and accepted by the defendants, if you find that it was given and received as payment of his debt against Young, or he afterwards transferred the same to Burroughs for value, without recourse, in either case his debt, as against Young, was paid and extinguished, and the debt represented by the acceptance became and was solely that of Fox & Howard to Burroughs, and the

22 transaction would operate as a payment by Fox and Howard to Knuteson, to the use of Young; and if it took place before the filing of the petition in bankruptcy against Young, then Fox & Howard might lawfully pay Burroughs, and the payment would be a valid discharge of Fox & Howard from any claim on the part of this plaintiff to the extent of the amount of such order, though made after Young was adjudged a bankrupt."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (19th exception.)

The defendant's counsel further requested said court to then and there charge said jury among other things as follows:

"As to the order given to Burroughs for $826.42, and accepted by the defendants, if you find that it was given and received as payment of his debt against Young, or he took no measures to charge Young by reason of the acceptance being partial or conditional, then this debt as against Young was paid, and the debt represented by the acceptance became and was that solely of Fox and Howard to Burroughs, and the transaction would amount to payment of Fox and Howard to Burroughs to the use of Young; and if it took place before the filing of the petition in bankruptcy against Young, then Fox and Howard might lawfully pay Burroughs, and the payment would be valid discharge of Fox & Howard from any claim on the part of the plaintiff to the extent of such order, though made after Young was adjudged a bankrupt."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (20th exception.)

The defendants further requested said court to then and there charge said jury among other things, as follows:

"Any and all payments made by Fox & Howard to Young's creditors at his request or by his direction, whether verbal or written, before the filing of the petition against Young in bankruptcy, are valid payments to that extent of their indebtedness to Young, and it cannot be predicated or maintained of such transactions that they would be void or inoperative payments under the bankrupt law so far as the defendants are concerned, even though Young was at the time of such payments insolvent to the knowledge of Fox & Howard and the party so receiving the same. In such case the motives which influenced them to make such payments are immaterial."

The said court then and there refused to so instruct said jury, to which said refusal the defendants by their counsel then and there excepted. (21st exception.)

The counsel for the defendants further requested said court to then and there instruct the said jury, among other things, as follows, to wit:

"By the provisions in the contract under which the work mentioned in the first cause of action was done, and by which it is provided that the defendants were to pay for the same, as follows, to the laborers employed in doing said work to the extent of the amount ascertained to be due them for such services, and the balance to be paid to Young, all the indebtedness which accrued to laborers in performing such work became and was chargeable against Fox & Howard, and in law their indebtedness which they were bound to pay, and the fact that portions of such indebtedness were transferred to other parties by laborers for goods or board would not discharge Fox & Howard; but they would remain liable to such assignee or assignees, and whatever sum they paid in such case in discharge of such transferred claims of the laborers was

paid by them in the discharge of their own debts, and cannot be recovered against them in this action; but such payments are an absolute discharge to the extent thus made, whatever may have been their knowledge or belief as to whether Young was insolvent when they so made the same, or whatever the motives with which they made such payments."

But the court then and there refused to instruct said jury as
23 so requested to which said refusal of said court to so charge said jury, the counsel for the defendants then and there excepted. (22d exception.)

Said court gave said instruction last named to the jury with the following addition thereto, and to the giving of the same with said addition, and to said addition thereto, the counsel for the defendant then and there excepted. (23d exception.)

Given with this addition: "That an order in the form shown to have been used by Mr. Young upon a trader to let the party named have goods on his account, does not operate as an assignment of the debt of the payee, the laborer, against the defendants and under them liable to such drawee."

The defendants, by their counsel, further requested said court to then and there charge the said jury, among other things, as follows:

"If you find that the claims of Burroughs founded upon the orders and acceptances to the amount of $1,370.86, and those of McCloud and charged to Young on the defendants' books, were purchased and taken by them under an agreement with the defendants, that they would pay them respectively the amount each should so obtain, and they were charged to Young on their books, then the defendants became liable to each for the amount so purchased and held by him, as upon an original understanding, and they were bound to pay accordingly, and the plaintiff cannot recover the amounts thus charged to Young in this action, but they are a valid set-off to the claim asserted by him in the first cause of action stated in the complaint herein."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (24th exception.)

The defendants, by their counsel, further requested said court to then and there charge the jury, among other things as follows:

"As to the order given to McCloud, and accepted by the defendants, if you find that it was given and received as payment of the debt against Young, or that he took no measures to charge Young by reason of the acceptances being partial or conditional, then his debt as against Young was paid, and the debt represented by the acceptance became and was that solely of the defendants to McCloud, and the transaction was a payment by defendants to McCloud to the use of Young, and if it took place before the filing of the petition in bankruptcy against Young, then Fox & Howard are entitled to a credit therefor on their account, unless Young or the plaintiff takes up and brings into court for the defendants their acceptanecs, so that they may be discharged therefrom."

The said court then and there refused to so instruct said jury, to which said refusal the counsel for the defendants then and there excepted. (25th exception.)

The defendants, by their counsel, further requested said court then and there to charge said jury, among other things, as follows, to wit:

"Under the bankrupt law, the assignee cannot proceed and recover both against the person paying the creditor of the bankrupt, under circumstances which make it a fraudulent preference, and the person to

whom the payment was made, if such payment was made, by the debtor of a bankrupt to his creditor. The remedies are inconsistent: one being founded on the idea that payment has been made in fraud of the law, and the other on the ground that no payment has been made, and it appearing from the petition of the plaintiff, filed in the bankrupt court, that he proceeded on it against Burroughs for the amount of his acceptance and orders on the ground that they had been paid to Burroughs, he cannot now turn round and treat the transaction as no payment, and recover the amount of such orders and acceptances in this action."

But the court then and there refused to instruct said jury as so requested, and further answering, said: "That proceeding was void, the court having no jurisdiction in such a proceeding to grant any
24 relief; a mere attempt of that kind could not have any effect;" to which refusal of said court to so charge said jury, and to which answer, as aforesaid, the defendants, by their counsel, then and there excepted. (26th exception.)

The defendants, by their counsel, further requested said court to then and there charge the said jury, among other things, as follows:

"As against the plaintiff, sueing as an assignee in bankruptcy of Nicholas Young, the defendants, Fox & Howard, if themselves solvent, had a right, although Young was insolvent, and they knew that fact, to pay their debt to him or his use, or to his creditor or creditors, by his direction, in such manner and in such obligations as such creditor or creditors were willing to accept as payment of their claims against Young, though such creditor or creditors then knew that Young was insolvent, and all the parties knew that the result would be to give such creditor or creditors an unlawful preference over the rest of Young's creditors, and such sum or sums as they have thus paid cannot be recovered by the plaintiff against them in this action, provided such transaction or transactions took place before the filing of the petition in bankruptcy against Young, and all payments set up by the defendant in this action, which are within the rule here laid down, must be allowed them by the jury."

The court then and there refused to so instruct said jury, to which said refusal, the defendants by their counsel, then and there excepted. (27th exception.)

And thereupon the court instructed said jury, among other things, as follows:

"The next question for you to determine is, as to the balance of $111.47 withheld as claimed, to pay laborers. The contract gives the defendants the right to pay laborers, and to that extent the payment is good as against Young and the plaintiff. But in order to defeat the recovery of this sum, the defendant' must show that the laborers have not been paid to that amount, and I think they should go further and show to whom it was in fact due, so that the court can see to whom they are liable; that they might be liable to somebody is not sufficient; it would be too uncertain to defeat this action."

To the giving of so much of said instruction as follows the word "amount" the defendants, by their counsel, did then and there except. (28th exception.)

The court then further instructed the jury on said subject, as follows:

"So you will ascertain whether there are any laborers who have not been paid; and if so, whom, and what amounts is due to each, and if you find any such, you will deduct such amounts from the $111.47, and if any balance remains after deducting such claim, you will allow the

same to the plaintiff, and if you do not find any work unpaid the plaintiff is entitled to the whole $111.47."

Said court, among other things instructed said jury, as follows:

"The contract authorized the defendants to pay the balance due the laborers, but it does not exempt Young from liability therefor, or prevent his paying them. If, therefore, the laborers accepted orders of Young in payment for their work or any part of it upon third persons, merchants, grocers, and butchers, which were accepted and paid by said parties to the laborers, such orders would by a payment of so much of the laborers' wages by Young, and the defendants, therefore, would be only liable to Young for the amount thus paid. The defendants would not be liable to the merchants or parties accepting and paying such orders; such orders would not nor did not operate as an assignment to the drawee, the merchant, and butcher, of the right of action of the payee of such order although a laborer. The defendants did not thereby become liable to pay the amount of such order to any other person than Young. The parties accepting them could not recover thereon of defendants, because the consideration as between
25 the payee and Young was the labor of the payee. So, if you find that these large orders mentioned in the testimony, and set up as payment, were given for such orders accepted and paid by Burroughs, McCloud, Pruyn and Son, and Knuteson, or either of them, such acceptance and payment did not establish a liability on the part of the defendants to them.

"Their liability was only to Young for the amount thereof."

To the giving of so much of said instruction last mentioned, as includes and follows the words, "The defendants would not be liable to the merchants or parties accepting and paying such orders," &c., and to each and every part of such portion thereof, the said defendants, by their counsel then and there excepted. (29th exception.)

And the said court did then and there among other things, further instruct said jury as follows: "As to the $502.20 mentioned and set up as a part payment, it is conceded that it consists of orders drawn by Young's creditors upon him, in favor of Burroughs. The statute requires such orders to be accepted in writing in order to be binding. Young would not therefore be liable upon them, unless he thus accepted them, or had placed himself in a situation to be estopped from setting up such want of acceptance."

To the giving of so much of said instruction as follows and includes the words, "The statute requires," &c., in the last paragraph and each and every part thereof, the defendants, by their counsel, did then and there except. (30th exception.)

And the court then and there further instructed said jury as follows: "Mr. Walton says, he consented a few days after they took them, or after they were given, to their paying them by charging them up to him. Mr. Young says, that he never had any conversation with him on this subject, or knew that they were so charged up.

"It is for the defendants to make out a clear case, to avoid the necessity of the written acceptance required by the statute, and the evidence must satisfy you that it would be a fraud on defendants, to now allow Young or his assignee to deny his liability, because not accepted in writing."

To the giving of which last instructions, being the last paragraph, the defendants, by their counsel, did then and there except. (31st exception.)

And the court further instructed the jury: "But the evidence tends

to show that they did not pay them to Burroughs until long after the bankruptcy, and then took indemnity for so doing.

"There is evidence tending to show, that these orders were first drawn in favor of Mr. Walton, and were then returned and drawn in favor of Mr. Young. They were not charged up on the 28th of November, when Mr. Walton says the other orders were, to Mr. Young. There is also some evidence tending to show that at least one of the drawers, Mr. Nott, afterwards proved up, in his own name, the amount of the order drawn by him, as a debt against the bankrupt's estate."

And the court further charged the jury, as follows: "If you find they were not received by the defendants and charged up to Young, with his consent and approval, and under such circumstances as to estop him from denying his liability on the ground that they were not accepted in writing, then you cannot allow their amount against the plaintiff here." To the giving of which last instruction, the counsel for the defendants did then and there except. (32d exception.)

The court further instructed the jury in reference to said orders, as follows: "Their payment after bankruptcy proceedings, in the manner claimed, would not, if you find as above stated, be any defense to this part of the plaintiffs' claim, or entitle the defendant to have them applied as payment thereon."

To the giving of which last named instruction, counsel for the defendants did then and there except. (33d exception.)

And the court further charged said jury, as follows: "But if you should find for the defendants on this point, you will still consider the matter in view of the bankrupt act, to which I shall hereafter call your attention. I have held during the trial, that if the acceptances
26 were given and accepted, under such circumstances as to contravene the provisions of the bankrupt act on the subject of preferences, that they would be void, and no payment as against the assignee."

To which instruction, contained in said last paragraph, following and including the words "I have held," &c., the defendants did then and there except. (34th exception.)

And the court further charged said jury as follows: "The act of Congress, 35th section, is as follows: 'That if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefitted thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provision of this act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it, or so to be benefitted.' In order to render the written acceptances in question void under the bankrupt law, and deprive the defendants of the use of the same as payments in this action, it is necessary to show: 1st. That Young was insolvent when they were given; 2d. That Fox & Howard had reasonable cause to believe him insolvent; 3d. That the person or persons in such case respectively, to whom they were given, had reasonable cause to believe Young insolvent. And further that Fox & Howard had reasonable cause to believe that the person or persons to whom they were so given,

had, when they took the same, reasonable cause to believe Young insolvent."

To which instruction, so given to said jury, and each every part thereof, the said defendants, by their counsel, did then and there except. (35th exception.)

And said court then and there further instructed said *said* jury, among other things, as follows:

"This, I think, a true exposition of the meaning of that section, so far as it goes, but it omits one element that I have hereafter added. The first point, that Young was insolvent in fact, that is, not being possessed of property enough to pay his debts, is shown by the bankrupt himself, if you believe him, and it does not seem to be seriously denied, and will not, I think, give you much trouble. The next, as to whether the defendants had reasonable cause to believe Young insolvent, is most earnestly denied.

"It will be seen by the act that it is not necessary for you to find that the defendants knew or believed Young to be insolvent, only that they had reasonable cause to believe so. Under that clause of the act, the true inquiry is, whether the defendants, as business men, acting with ordinary prudence, sagacity and discretion, had reasonable cause to believe Young insolvent, in view of all the facts known to them at the time. If the defendants had the means of knowledge upon the subject at hand, and omitted to examine and inquire, when inquiry would have shown his insolvent condition, they are charg'able with the knowledge which it is reasonable to believe such inquiry would have shown.

"The law requires of a party, as a moral duty, when about to perform an act by which the rights of another party may be affected, to inquire, and whatever fairly puts him on inquiry is sufficient notice when the means of knowledge are at hand, and by omitting to inquire he violates a plain duty, and is then held charg'able with a knowledge of the facts which by a proper inquiry he might have ascertained.

"The United States Supreme Court in construing this provision of the act say: 'And reasonable cause must be considered to have been had, when such a state of facts was brought to their notice, in
27 respect to the affairs and pecuniary condition of the bankrupt, as would have led prudent business men to the conclusion that he could not meet his obligations in the ordinary course of business. Apply the facts proven in this case to the act as thus interpreted, and say whether or not the defendants had reasonable cause to believe the bankrupt insolvent at the time they accepted these orders."

To the giving of which said last instructions to the jury, and to each and every part thereof, and particularly to the last paragraph commencing with the words, "apply the facts, &c.," the defendants, by their counsel, did then and there except. (36th exception.)

And the said court then and there, among other things, further instructed said jury as follows:

"If you find that they had, you will further inquire whether Burroughs, McCloud, Pruyn & Son, and Knuteson had not reasonable cause also to believe Young insolvent when they obtained the orders, and in determining that you will adopt the same rule that I have instructed you to adopt and follow as to the defendants."

To the giving of which said instruction to the jury defendants, by their counsel, did then and there except. (37th exception.)

And the said court further instructed said jury, among other things, as follows:

"And if you find that they did have reasonable cause so to believe, you will further inquire whether defendants had not also good reason to believe the creditors Burroughs, McCloud, Pruyn & Son, and Knuteson had good reason so to believe."

To the giving of which said instruction to the jury said defendants, by their counsel, did then and there except. (38th exception.)

And the said court did then and there further charge said jury, among other things, as follows:

"If you find these several questions in favor of the plaintiff, you have to find further that the orders and acceptances were made with a view to give a preference to those creditors in fraud of the provisions of the bankrupt act. In this case if these orders and acceptances are good in the hands of Burroughs and the other parties, they did create a preference in their favor, as is conceded I think, and if not, the testimony tends very strongly to establish it, for it is shown that the bankrupt, after paying those in full, would not have enough to pay his other debts in full, and such being the result, the bankrupt is charg'able in law with having intended it. The U. S. Supreme Court have laid down the following rule to be followed in such cases under the act. 'It is a general principle,' they say, 'that every one must be presumed to have intended the necessary consequences of his acts. The transfer in any case, by a debtor, of a large portion of his property, while he is insolvent to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor bankrupt can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts.' The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made of it, with a view to secure the property or any part of it, and thus prevent such equal distribution, is a transfer in fraud of the act. I think you will have very little difficulty in finding that the orders created an unlawful preference under the act, so far as the bankrupt is concerned, and if you find that the defendants and the creditors had good cause to believe Young insolvent under the rules above laid down, I think the same rule of presumption would apply to them as to the bankrupt. They will be presumed to have intended to accomplish the necessary result of their acts."

To the giving of which said instruction to the jury, and to each and every part and portion thereof, the said defendants by their counsel did then and there except. (39th exception.)

28 And the said court did then and there further charge said jury, among other things, as follows:

"If you find that the several parties, including the defendants, within the rules of law above laid down, were guilty of a fraud upon the act, and that the creditors and the defendants were alike to blame and guilty in the transaction, I do not think the defendants were even legally liable to the creditors upon these acceptances. The creditors could not collect them of defendants."

To the giving of which said instruction to said jury, and to each and every part and portion thereof, the said defendants, by their counsel, did then and there except. (40th exception.)

And the said court did then and there further charge said jury, among other things, as follows:

"The law leaves parties violating its provisions where they place

themselves. A contract entered into in violation of and contrary to the provisions of law, involving a question of moral duty or of policy, is void as between the parties, and as there is no claim that these acceptances have passed into the hands of an innocent party, this suit is to be determined upon the principles applicable to the actors in the fraud."

To the giving of which said instruction to the jury, and to each and every part and portion thereof, the defendants' counsel did then and and there except. (41st exception.)

And said court did then and there further charge said jury, among other things, as follows:

"In short, the case may be stated thus: The defendants were jointly indebted to Mr. Young in the amount of these orders. Instead of paying him the money, they agreed to pay it to his creditors by their acceptances and the orders which entered into the $502.00. The plaintiff claims that that was not a good payment, on the ground that those acceptances were void in the law, and that the defendants knew the facts which rendered them void, and that therefore the debt remains unpaid. If such is the case, the debt is not paid, and the defendants are liable to the plaintiff as assignee."

To which said charge and instruction, and especially to the last sentence thereof, commencing, "If such is the case," &c., so given to the jury as aforesaid, the defendants, by their counsel, did then and there except. (42nd exception.)

And the said court did then and there further charge and instruct said jury, among other things, as follows:

"If those orders and acceptances were void as creating a preference in favor of the creditors obtaining them, then such creditors could not hold the money, even if paid to them. And the defendants, if they knew their fraudulent character and purpose, would not be bound to pay them, or justified in paying them; and they have not paid McCloud, and Pruyn and Sons, and will not have to, unless you find that the acceptances were valid; and if they paid the others, with knowledge of the proceedings in bankruptcy, and only on being indemnified, they do not stand in any better condition as to those."

To the giving of the last-named instruction to the jury, and particularly that portion which follows and includes the words "and the defendants, if they knew," &c., the defendants, by their counsel, did then and there except. (43rd exception.)

"But, as requested by the defendants' counsel, I charge you that the fact that when Fox & Howard paid the acceptances to Burroughs they took from him an indemnity against the claims of the plaintiff or creditors' proceeding in bankruptcy, of itself would not destroy or affect a payment otherwise valid in law."

And the said court did then and there further instruct and charge said jury, among other things, as follows:

"The plaintiff claims that in this view this suit is defended really for the benefit and in the interest of McCloud and Burroughs; that Burroughs was not paid until he indemnified the defendants for so doing; and that a recovery herein would not, in fact, benefit the defendants, for they would have to pay the amount of the unpaid acceptances immediately to McCloud, the holder, and would release the bail on the indemnity-bond; that this is a suit to try the title to the fund,
29 and, if the case shows that the creditors obtaining the acceptances are not entitled to them, the plaintiff is entitled to recover. This is the natural and legal result of the premises, if they are sus-

tained, but these questions only arise upon your finding the transaction illegal and void.

"The plaintiff also claims that the defendant might have avoided all questions so far as McCloud's claim is concerned by paying the amount of these acceptances into court, and asking that McCloud be made a party, which is the law beyond question, but they were not bound to do so. They could, if they choose, defend themselves instead.

"The plaintiff also claims that they paid Burroughs voluntarily, and upon being indemnified, so that they cannot suffer by a judgment against them for that; such is so theoretically. They undoubtedly could have avoided all risk in the premises by interpleading the contestants to the fund, and paying it over into court, and left the plaintiff and Burroughs and McCloud to settle their title as best they could; but I do not think they were bound to do so. They might, if they choose, take the risk of defending this suit themselves, as they have. It is also claimed by the plaintiff that you would be warranted in inferring from this conduct that the defendants are acting in concert with the creditors seeking the preference, and that you have a right to infer that they have some interest with them to induce them to do so. In other words, that the defendants are acting in collusion with such creditors.

"These facts alone would not be sufficient to warrant such a conclusion I think, but you may consider them in connection with the other facts in testimony, and, if you are satisfied from the evidence that they are acting in collusion to defraud the other creditors of the bankrupt, the whole transaction between them would be void and constitute no defense to this suit. If you do not find the acceptances void, they are good payments as against the plaintiff's claim."

To the giving of so much of said last-named instruction contained in the last paragraph as follows and includes the words, "These facts alone would not," &c., down to and including the words, "No defense to this suit," the defendants, by their counsel, did then and there except. (44th exception.)

And the said court, under the charge and with the direction aforesaid, left the aforesaid issues and the evidence so given on the trial thereof as aforesaid to the said jury, and the jury aforesaid then and there gave their verdict for the said plaintiff for four thousand six hundred and ninety-one $\frac{47}{100}$ dollars damages.

And, inasmuch as the said several matters so produced and given in evidence on the part of the said plaintiff, and the said several objections thereto, on the part of the said defendants, and the ruling of the said court thereon in admitting the same, and exception taken thereto by said defendants, and the said several matters so produced and given in evidence on the part of the said defendants, and by their counsel aforesaid objected and insisted on as a bar to the aforesaid action, and the refusal of said court to give the said several instructions to the jury requested by the defendants, and the exceptions taken by them to such refusals, as well as the said instructions so given as aforesaid to the jury and excepted to by counsel for the defendants, do not appear by the record of the trial and verdict aforesaid, the said counsel for the said defendants did then and there propose to take their aforesaid exceptions to the rulings and opinions of the said court, and requested the judge thereof, to wit, Hon. J. C. Hopkins, district judge aforesaid, *and requested him* to sign and seal this bill of exceptions, containing the said several matters and things as aforesaid, according to the form
30 of the statute in such case made and provided, and the rules and practices of said court.

Thereupon the said district judge, at the request of the said counsel for said defendants, did sign and seal this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, and the rules and practice of said court, this 31st day of March, A. D. 1873.

J. C. HOPKINS, *Judge.* [SEAL.]

Exhibit "A" referred to in the foregoing bill, and made a part thereof.

The United States district court for the western district of Wisconsin, in bankruptcy.

IN THE MATTER OF NICHOLAS YOUNG, A BANKRUPT.

To the honorable James C. Hopkins, judge of said court:

The petition of Edwin W. Gardner, assignee of said bankrupt, respectfully represents:

That said Nicholas Young was, by said court, on the 17th day of January, A. D. 1871, duly adjudged a bankrupt on the petition of his creditors, which petition was filed on the 7th day of January, A. D. 1871; that afterwards, on the 6th day of February, 1871, your petitioner was, at the adjourned first meeting of the creditors of said bankrupt, duly elected assignee of said bankrupt, and on the 14th day of February, 1871, his such election was duly approved by your honor, his bond duly given, approved, and filed, and he accepted and entered upon said trust, reference being had to the records, papers, and proceedings in this matter to more particularly show the proceedings thereon.

And your petitioner further represents that the said bankrupt was, during the months of October and November last, employed as a subcontractor for the construction of a part of the railroad running from Madison, Dane County, to Baraboo, Sauk County, in said district, known as the Baraboo Air-Line Railroad, by and under Messrs. "Fox and Howard," which is a firm composed of Harry Fox, William B. Howard, John Wheat, and Clark Lipe, doing business under such firm-name, who were during said time, and still are, contractors for building the whole of said railroad from Madison to Baraboo aforesaid; that on the 30th day of November last the said Nicholas Young was insolvent, and being indebted to one E. Knuteson in the sum hereinafter named, and being unable to pay such indebtedness to said E. Knuteson, bargained and sold said indebtedness to one David N. Burroughs for a sum not exceeding two-thirds of the whole of such indebtedness, which then was, as your petitioner believes, one thousand sixty-five and $\frac{14}{100}$ths dollars. And therefore, with a view to give a preference to said Knuteson, the creditors as aforesaid of said bankrupt, and to David N. Burroughs, his assignee of such indebtedness, both the said Knuteson and said Burroughs having reasonable and sufficient cause to believe the said Nicholas Young to be insolvent, and that the pledge and assignment hereinafter mentioned was made in fraud of the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, the said Nicholas Young did make a draft or order in the words and figures following, to wit:

"LODI, *Dec.* 1*st*, 1870.

"Messrs. FOX & HOWARD,
"*Lodi, Wisconsin:*

"GENTLEMEN: Please pay to Mr. E. Knuteson the sum of one thou-

sand sixty-five and $\frac{14}{100}$ths dollars, being amount of my account, and charge the same to

"Yours, respectfully,

"N. YOUNG."

And the said draft or order was, at the same time, in pursuance of such previous bargain as aforesaid between said payee and said Burroughs, at once then and there indorsed by said Knuteson as follows, to wit:

"DEC. 1st, 1870.

"Please pay to D. N. Burroughs without recourse.

"E. KNUTESON,"

31 And then and there delivered to said Burroughs. And the said Fox & Howard, drawees thereof, were then indebted to said Nicholas Young in a large sum of money for work and labor on said railroad; and thereupon, with the view and intent aforesaid, the said Burroughs, well knowing the insolvent condition of said Young, they, the said Burroughs and the said Young, then and there procured the said Fox & Howard to accept the said draft or order in the words and figures following, viz: "Accepted and promised to be paid out of any money in our hands due or belonging to Mr. N. Young, after the payment of laborers' liens in our hands, and orders previously accepted.

"December 1st, 1870.

"FOX & HOWARD,
"Per W. J. WALTON."

Thereby procuring to be assigned to said Burroughs a part of the property of said bankrupt in the hands of said Fox & Howard, and of their indebtedness to him contrary to law.

And thereupon, on the 28th day of February, A. D. 1871, with full knowledge both on the part of the said Fox and Howard and said Burroughs, that said Young had been adjudged a bankrupt and a warrant issued in this matter and your petitioner appointed assignee of said bankrupt, the said Fox & Howard paid to the said Burroughs the full amount of said order, to wit, one thousand sixty-five and $\frac{14}{100}$ths dollars, and interest thereon, in money or in goods, wares, and merchandise, accepted and received by said Burroughs as the full equivalent of money; and the said Burroughs and the said Fox & Howard utterly refused to pay the same to your petitioner.

And your petitioner further represents, that on the 3d day of December, A. D. 1870, the said bankrupt was indebted to said David N. Burroughs in the sum of about eight hundred and twenty-six and $\frac{42}{100}$ths dollars, and said Nicholas Young was then insolvent; and the said David N. Burroughs had reasonable and sufficient cause to believe him, the said Young, to be insolvent. And then the said Young, in fraud of the provisions of the aforesaid act of Congress, and with a view and intent to give a preference to said Burroughs, and at the procurement and instigation of said Burroughs, made by one B. O. Ulsrud, the clerk of said Young, his draft or order in writing on Fox & Howard, who were then, as hereinbefore set forth, indebted to said Young in the words and figures following, to wit:

"LODI, *December 3rd*, 1870.

"Messrs. FOX & HOWARD:

"Please pay the bearer, D. N. Burroughs, eight hundred and twenty-

six and $\frac{42}{100}$ dollars, for goods in October and November, payable on the 15th day of December next, and charge the same to

"N. YOUNG, *Contractor*,
"Per B. O. ULSRUD."

Thereby intending and designing to pledge, assign, and set apart to said Burroughs, for the full payment of his, the said bankrupt's, indebtedness to him, the said sum of money out of such sum as might be due or to become due and owing to him, said Young, from said Fox & Howard; and the said Burroughs, the same having reasonable and sufficient cause to believe said Young to be insolvent, and well knowing that such draft, assignment, and pledge was made in fraud of the provisions of the aforesaid act of Congress; and thereafter, on the 28th day of February, A. D. 1871, with full knowledge on the part of said Fox & Howard, and of said Burroughs, that said Young had been, as aforesaid, adjudged a bankrupt, and that a warrant had been issued in this matter, and that your petitioner had been duly appointed assignee of said bankrupt, the said Fox & Howard paid to said Burroughs the full amount of said order or draft, to wit, eight hundred and twenty-six and $\frac{42}{100}$th dollars, with interest, in money or in goods, wares, and merchandise, which were accepted by said Burroughs as the full equivalent of money,
32 and the said Fox & Howard and the said Burroughs utterly refuse to pay the same to your petitioner.

And your petitioner further represents that on the 2d day of December, A. D. 1870, the said bankrupt was indebted to one J. A. Collins in the sum of thirty dollars, and said bankrupt was then insolvent. And the said Collins had reasonable and sufficient cause to believe him to be insolvent. And the said Young, with a view and intent to give a preference to said Collins, and in fraud of the provisions of the aforesaid act of Congress, and at the procurement and instigation of said David N. Burroughs, (who had then bargained to purchase of said Collins, at a large discount, the amount of which is unknown to your petitioner, his, said Collins' said debt against said Young,) made a draft or order on said Fox & Howard, who were then, as above set forth, indebted to said Young, in the words and figures following, to wit:

"LODI, *December* 2, 1870.

"Messrs. FOX & HOWARD:

"Please pay to J. S. Collins, for board in November thirty dollars payable on the 15th day of December next, and charge the same to

N. YOUNG, *Contr.*,
"Per B. O. ULSRUD,

The said draft or order being written and signed for said bankrupt, under his direction, by said B. O. Ulsrud, his clerk; and the said bankrupt thereby intending to pledge, assign, and transfer to said Collins, and to said Burroughs as his assignee, for the full payment of said bankrupt's said indebtedness to said Collins, the aforesaid sum of money, and out of the amount of the indebtedness of said Fox & Howard due or to become due to him, said Young; and the said Collins received the same, and then and there sold and assigned the same to said Burroughs, both said Collins and said Burroughs having reasonable and sufficient cause to believe said Young to be insolvent, and that such pledge and assignment was made in fraud of the provisions of the aforesaid act of Congress.

And thereafter, on the 28th day of February, A. D. 1871, with full knowledge, both on the part of said Fox & Howard, and said Burroughs,

of the adjudication of bankruptcy, the issuance of the warrant, and the appointment of your petitioner as assignee in this matter as aforesaid, the said Fox & Howard paid to the said Burroughs the full amount of said order, to wit, thirty dollars and the interest thereon, in money or in goods, wares, and merchandise, which were accepted in payment thereof by said Burroughs, as the full equivalent of money, and the said Burroughs and the said Fox & Howard, utterly refuse to pay the same to your petitioner.

And your petitioner further represents that, on the 30th day of November, A. D. 1870, the said bankrupt was indebted to one M. Cassett, in the sum of about one hundred and fifty-one and $\frac{27}{100}$ths dollars, and the said Young was insolvent and unable to pay the same to him, and thereupon, on said day last aforesaid, said Cassett bargained and sold his said debt against said Young to the said David N. Burroughs for a considerable sum less than the face thereof, but the exact amount is unknown to your petitioner, and thereupon, in transfer and assignment of such indebtedness, said Cassett made and delivered to said Burroughs his draft or order on said bankrupt, in the words and figures following, to wit:

"LODI, *November 30th*, 1870.

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs one hundred and fifty-one and $\frac{27}{100}$ths dollars, or as much thereof as there is coming to me, and deduct the same from my pay-account, and this shall be your receipt.

"M. CASSETT."

And on the 30th of November, A. D. 1870, the said bankrupt was
33 also indebted to one Ernest Klebber, in the sum of about seventy and $\frac{89}{100}$ dollars, and the said bankrupt, N. Young, was insolvent and unable to pay the same to him, and thereupon, on said day, said Klebber bargained and sold his said debt against said Young to said David N. Burroughs for a sum much less than the face thereof, but the exact amount your petitioner is not informed of, and in transfer and assignment of such indebtedness, said Klebber made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, in the words and figures following, to wit:

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs seventy and $\frac{89}{100}$ths dollars, or as much thereof as there is coming to me, and deduct the same from my account, and this shall be your receipt.

"ERNEST KLEBBER."

And on the 30th day of November, A. D. 1870, the said bankrupt was also indebted to one Welscome S. Nott in the sum of about one hundred and twenty-nine and $\frac{54}{100}$ths dollars, and said bankrupt was insolvent and unable to pay the same to him, and thereupon said Nott bargained and sold his said debt against said Young to the said David N. Burroughs at a sum much less than the face thereof, but the exact amount your petitioner is not informed of, and in transfer and assignment of such indebtedness said Nott made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, which is the words and figures following, to wit:

"LODI, WIS., *Nov. 30th*, 1870.

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs one hundred twenty-nine and $\frac{54}{100}$ dollars, or as much thereof as there is coming to me, and deduct the same from my account, and this shall be your receipt.

"WELSCOME S. NOTT."

And on the 30th day of November, A. D. 1870, the said bankrupt was also indebted to Henry Slosser in the sum of about sixty-nine dollars, and was insolvent and unable to pay the same, and thereupon said Slosser bargained and sold his said debt against said Young to the said David N. Burroughs at a sum much less than the face thereof, but the exact amount your petitioner is not informed of, and in transfer and assignment of such indebtedness, said Slosser made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, in the words and figures following, to wit:

NOVEMBER 30th, 1870.

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs sixty-nine dollars, or as much thereof as there is coming to me, and deduct from my account.

"HENRY SLOSSER."

And on the 1st day of December, A. D. 1870, the said bankrupt was also indebted to one N. P. Bunell in the sum of about fifty-one and $\frac{50}{100}$ths dollars, and was insolvent and unable to pay the same, and thereupon said Bunnell bargained and sold his said debt against said bankrupt to said David N. Burroughs at a sum much less than the face thereof, but the exact amount your petitioner is not informed of; and thereupon, in transfer and assignment of such indebtedness, said Bunnell made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, in the words and figures following, to wit, that s to say:

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LODI, *December 1st*, 1870.

"Mr. N. YOUNG:

"Please pay to D. N. Burroughs or bearer fifty-one and $\frac{50}{100}$ths dollars, being amount of board-bill for the month of November, and oblige

"N. P. BUNNELL."

34 And your petitioner further represents that, on the 1st day of December, A. D. 1870, the said Burroughs, having all the aforesaid orders or drafts of said Cassett, Klebber, Nott, Slosser, and Bunell, amounting in the whole to the sum of four hundred seventy-two and $\frac{20}{100}$ths dollars, the said bankrupt verbally accepted the same and assented thereto, and the said Fox & Howard being indebted to him, said Young, he, the said Young, then, at the procurement of said Burroughs, gave a verbal direction, as your petitioner is informed, to said "Fox & Howard" to pay said drafts on him held by said Burroughs, and said "Fox & Howard" verbally assumed to do so, and verbally agreed with said Burroughs to pay said debts of said Young if there remained sufficient due or to become due said Young to pay the same; that said verbal direction of said Young and verbal acceptance by said "Fox & Howard" were given and made with the view and

of the adjudication of bankruptcy, the issuance of the warrant, and the appointment of your petitioner as assignee in this matter as aforesaid, the said Fox & Howard paid to the said Burroughs the full amount of said order, to wit, thirty dollars and the interest thereon, in money or in goods, wares, and merchandise, which were accepted in payment thereof by said Burroughs, as the full equivalent of money, and the said Burroughs and the said Fox & Howard, utterly refuse to pay the same to your petitioner.

And your petitioner further represents that, on the 30th day of November, A. D. 1870, the said bankrupt was indebted to one M. Cassett, in the sum of about one hundred and fifty-one and $\frac{27}{100}$ths dollars, and the said Young was insolvent and unable to pay the same to him, and thereupon, on said day last aforesaid, said Cassett bargained and sold his said debt against said Young to the said David N. Burroughs for a considerable sum less than the face thereof, but the exact amount is unknown to your petitioner, and thereupon, in transfer and assignment of such indebtedness, said Cassett made and delivered to said Burroughs his draft or order on said bankrupt, in the words and figures following, to wit:

"LODI, *November 30th*, 1870.

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs one hundred and fifty-one and $\frac{27}{100}$ths dollars, or as much thereof as there is coming to me, and deduct the same from my pay-account, and this shall be your receipt.

"M. CASSETT."

And on the 30th of November, A. D. 1870, the said bankrupt was
33 also indebted to one Ernest Klebber, in the sum of about seventy and $\frac{89}{100}$ dollars, and the said bankrupt, N. Young, was insolvent and unable to pay the same to him, and thereupon, on said day, said Klebber bargained and sold his said debt against said Young to said David N. Burroughs for a sum much less than the face thereof, but the exact amount your petitioner is not informed of, and in transfer and assignment of such indebtedness, said Klebber made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, in the words and figures following, to wit:

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs seventy and $\frac{89}{100}$ths dollars, or as much thereof as there is coming to me, and deduct the same from my account, and this shall be your receipt.

"ERNEST KLEBBER."

And on the 30th day of November, A. D. 1870, the said bankrupt was also indebted to one Welscome S. Nott in the sum of about one hundred and twenty-nine and $\frac{54}{100}$ths dollars, and said bankrupt was insolvent and unable to pay the same to him, and thereupon said Nott bargained and sold his said debt against said Young to the said David N. Burroughs at a sum much less than the face thereof, but the exact amount your petitioner is not informed of, and in transfer and assignment of such indebtedness said Nott made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, which is the words and figures following, to wit:

"LODI, WIS., *Nov. 30th*, 1870.

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs one hundred twenty-nine and $\frac{54}{100}$ dollars, or as much thereof as there is coming to me, and deduct the same from my account, and this shall be your receipt.

"WELSCOME S. NOTT."

And on the 30th day of November, A. D. 1870, the said bankrupt was also indebted to Henry Slosser in the sum of about sixty-nine dollars, and was insolvent and unable to pay the same, and thereupon said Slosser bargained and sold his said debt against said Young to the said David N. Burroughs at a sum much less than the face thereof, but the exact amount your petitioner is not informed of, and in transfer and assignment of such indebtedness, said Slosser made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, in the words and figures following, to wit:

NOVEMBER 30th, 1870.

"N. YOUNG, *Contractor:*

"Please pay to D. N. Burroughs sixty-nine dollars, or as much thereof as there is coming to me, and deduct from my account.

"HENRY SLOSSER."

And on the 1st day of December, A. D. 1870, the said bankrupt was also indebted to one N. P. Bunell in the sum of about fifty-one and $\frac{50}{100}$ths dollars, and was insolvent and unable to pay the same, and thereupon said Bunnell bargained and sold his said debt against said bankrupt to said David N. Burroughs at a sum much less than the face thereof, but the exact amount your petitioner is not informed of; and thereupon, in transfer and assignment of such indebtedness, said Bunnell made and delivered to said Burroughs his draft or order on said bankrupt, Nicholas Young, in the words and figures following, to wit, that
s to say:
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LODI, *December 1st*, 1870.

"Mr. N. YOUNG:

"Please pay to D. N. Burroughs or bearer fifty-one and $\frac{50}{100}$ths dollars, being amount of board-bill for the month of November, and oblige

"N. P. BUNNELL."

34 And your petitioner further represents that, on the 1st day of December, A. D. 1870, the said Burroughs, having all the aforesaid orders or drafts of said Cassett, Klebber, Nott, Slosser, and Bunell, amounting in the whole to the sum of four hundred seventy-two and $\frac{20}{100}$ths dollars, the said bankrupt verbally accepted the same and assented thereto, and the said Fox & Howard being indebted to him, said Young, he, the said Young, then, at the procurement of said Burroughs, gave a verbal direction, as your petitioner is informed, to said "Fox & Howard" to pay said drafts on him held by said Burroughs, and said "Fox & Howard" verbally assumed to do so, and verbally agreed with said Burroughs to pay said debts of said Young if there remained sufficient due or to become due said Young to pay the same; that said verbal direction of said Young and verbal acceptance by said "Fox & Howard" were given and made with the view and

intent, on the part of said Young, and said Burroughs, and said "Fox & Howard" as well, to give a preference to the said Burroughs; that said Burroughs had sufficient cause to believe said Young to be insolvent, as he was, and that said pledge and assignment to him of the said indebtedness of the said "Fox & Howard" to said Young was made in fraud of the provisions of the act of Congress aforesaid. And thereafter, on the 28th day of February, A. D. 1871, with full knowledge, both on the part of said Fox & Howard and said Burroughs, of the adjudication of bankruptcy, the issuance of the warrant, and the appointment of your petitioner as assignee in this matter, as aforesaid, the said Fox & Howard paid to the said Burroughs the full amount of said orders, to wit, four hundred seventy-two and $\frac{20}{100}$ths dollars, and the interest thereon in money, or in goods, wares, and merchandise, which were accepted in payment thereof as the equivalent of money by said Burroughs, and the said Fox & Howard utterly refuse to pay the same to your petitioner.

And your petitioner further represents that all of the aforesaid transactions and proceedings, except the payments, took place within four month' before the filing of the petition for and the adjudication of bankruptcy herein, and also took place at the village or town of Lodi, in Columbia County, in the said western district, except the payment of said several drafts or orders, which was done at Merrimack, in Sauk County, in said district.

And thereupon your petitioner prays that the said David N. Burroughs may be compelled to plead or make answer hereto, and that, upon the coming in of such plea or answer, a time may be fixed and appointed for hearing this matter; that an order may be made for taking testimony to be produced herein, and that the said David N. Burroughs may be compelled, by the order or the judgment of said court, to pay to your petitioner the said several sums of money so as aforesaid received by him of the assets and estate of said bankrupt, with interest, and the cost of this proceeding, and that your petitioner may have such other or further order or relief, or both, as may be just and according to law.

And may it please your honor to grant therefor the proper process, by summons, subpœna, or order to show cause, commanding the said David N. Burroughs, within a time to be directed, and under a certain penalty, as your honor may seem just and proper, to make answer hereto, and further to stand to and abide by such order or judgment as may be made herein, and your petitioner will ever pray, &c.

E. W. GARDNER,
Assignee, &c.

WM. F. AND H. VILAS,
Attorneys for Petitioner.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Edwin W. Gardner being duly sworn on his oath says that the foregoing petition by him signed is true of his own knowledge, except as to the matters therein stated by him on his information and be-
35 lief, and as to those matters he verily believes them to be true.

E. W. GARDNER.

Subscribed and sworn to before me this 25th day of March, A. D. 1871.

J. C. HOPKINS, *U. S. Judge.*

(Endorsed as follows:) U. S. district court, western district of Wisconsin. In the matter of N. Young, bankrupt. Petitition of E. W. Gardner, assignee. Filed March 25th, 1871. F. M. Stewart, clerk, by P. R. Sanborn, deputy.

Exhibit B referred to in the foregoing bill of exceptions.

$4.00.] LODI, *Oct. 8th*, 1870.

E. KNUTESON, Esq.: Please let the bearer, Robert Hejuse, have four dollars' worth in goods, and oblige,

N. YOUNG, *Contractor*,
Per B. O. ULSRUD.

On this day, to wit, the 15th day of April, A. D. 1873, said defendants, by their attorneys, filed in said court in said entitled cause their bond on writ of error; which said bond is in the words and figures following, to wit:

Bond of appeal.

Circuit court of the United States for the western district of Wisconsin.

Know all men by these presents, that we, Harry Fox, William B. Howard, Clark Lipe, John Wheat, of Chicago, in the State of Illinois, and James E. Miller and O. B. Green, of Chicago, in the State of Illinois, are held and firmly bound unto Edwin W. Gardner, as assignee in bankruptcy of Nicholas Young, a bankrupt, in the sum of ten thousand dollars, to be paid to the said Edwin W. Gardner, as such assignee, his executors or administrators; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 14th day of April, 1873.

Whereas the above-named Harry Fox, William B. Howard, Clark Lipe, and John Wheat have prosecuted a writ of error to the circuit court of the United States for the western district of Wisconsin to reverse the judgment rendered in the above-entitled action by the district court of the United States for the western district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the above-named Harry Fox, William B. Howard, Clark Lipe, and John Wheat shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HARRY FOX.	[SEAL.]
WILLIAM B. HOWARD.	[SEAL.]
CLARKE LIPE.	[SEAL.]
JOHN WHEAT.	[SEAL.]
J. E. MILLER.	[SEAL.]
O. B. GREEN.	[SEAL.]

Sealed and delivered in presence of—
O. P. ABERCROMBIE.
D. K. TENNEY.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

James E. Miller and O. B. Green, of Chicago, in said district, being duly sworn, each for himself, says that he is a freeholder and householder in said city of Chicago, in said district, and is worth the sum of ten thousand dollars in property not exempt from seizure and sale on execution, within said city, and over and above all debts by him owing, and all liabilities against him.

J. E. MILLER.
O. B. GREEN.

36 Subscribed and sworn to before me April 15th, A. D. 1873.

PHILIP A. HOYNE,
U. S. Commissioner N. D. Ill.

Security approved.

THOMAS DRUMMOND.

APRIL 16, 1873.

On this day, to wit, the eighteenth day of April, 1873, said plaintiff in error, by their attorney, filed in said court in said entitled cause their citation on writ of error as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

To Edwin W. Gardner, as assignee in bankruptcy of Nicholas Young, a bankrupt, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States for the western district of Wisconsin, to be holden at Madison, in said district, on the 2d day of June next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western district of Wisconsin, wherein Harry Fox, William B. Howard, Clark Lipe, and John Wheat are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 16th day of April, A. D. 1873.

J. C. HOPKINS, *Judge.*

(Indorsed:) Service of copy of the within admitted. April 19, 1873.

W'M F. VILAS,
Att'y for Def't in Error.

And on same day assignment of error, filed in said court as follows, to wit:

Circuit court of the United States for the western district of Wisconsin, of June term, in the year of our Lord one thousand eight hundred and seventy-three.

HARRY FOX, WILLIAM B. HOWARD, CLARK Lipe, & John Wheat, defendants in error,	Error to the district court of the United States for the western district of Wisconsin.
vs.	
EDWIN W. GARDNER, AS ASSIGNEE IN BANKruptcy of Nicholas Young, a bankrupt.	

And afterwards, to wit, on the first Monday of June in the same term,

before the judges of the circuit court of the United States for the western district of Wisconsin, at the United States court-house, in the city of Madison, in said district, comes the said Harry Fox, William B. Howard, Clark Lipe, and John Wheat, by Gregory & Pinney, their attorneys, and say that in the record and proceedings aforesaid there is a manifest error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid given was greater for the said Edwin W. Gardner, as assignee in bankruptcy of Nicholas Young, a bankrupt, against the said Harry Fox, William B. Howard, Clark Lipe, and John Wheat, whereas by the law of the land the said judgment ought to have been given for the said
37 Harry Fox, William B. Howard, Clark Lipe, and John Wheat, and against the said Edwin W. Gardner, as assignee as aforesaid, and in that the said district court erred in its rulings on the trial, in admitting testimony and in refusing the several requests of said Harry Fox, William B. Howard, Clark Lipe, and John Wheat, to charge the jury as stated in the bill of exceptions and record aforesaid, and in instructing the jury in the several respects excepted to by said Harry Fox, William B. Howard, Clark Lipe, and John Wheat, as stated in said record and bill of exceptions, all of which rulings and errors, both as to the admission of evidence, requests to charge the jury, and instructions to the jury have by said district court, and each of them are pointed out in the exceptions of the said Harry Fox, William B. Howard, Clark Lipe, and John Wheat, contained in said record and bill of exceptons made report thereof, and are numbered therein from one to forty-four inclusive, and said rulings and decisions so excepted to and each of them, they, the said Harry Fox, William B. Howard, Clark Lipe, and John Wheat, pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things they have lost by occasion of the said judgment, &c.

GREGORY & PINNEY,
Attorneys and of Counsel for the Plaintiffs in error.

(Indorsed:) Service of copy of the within admitted April 19th, 1873.
W'M F. VILAS,
Att'y for Def't in error.

WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of the district court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom; and also a true copy of the security on the writ of error and the original citation and service thereof, and of the assignment of errors under said writ.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court at my office, in the city of Madison, this 17th day of May, A. D. 1873, and of our Independence the ninety-seventh year.

[SEAL.] F. M. STEWART, *Clerk.*

38 On this day, to wit, the 20th day of May, A. D. 1873, the return of the clerk of the district court of the United States, for the western district of Wisconsin, to the writ of error to said district court, in said cause received and filed in the circuit court of the United States for the western district of Wisconsin, and record printed.

On this day, to wit, the 11th day of June, A. D. 1873, in the June term A. D. 1873, of said circuit court in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, & Clark Lipe, plaintiffs in error,
vs.
EDWIN W. GARDNER, AS ASSIGNEE OF NICHOlas Young, a bankrupt, defendant in error. } At law.

This cause came on to be tried before the honorable David Davis, associate justice of the Supreme Court of the United States, on writ of error to the district court of the United States for the western district of Wisconsin, from the judgment of said district court rendered therein, and was argued by counsel and cause taken under advisement.

And now, on this 15th day of said term, to wit, on the 18th day of June, 1873, appears the following entry, to wit:

HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, & Clark Lipe, plaintiffs in error,
vs
EDWIN W. GARDNER, AS ASSIGNEE OF NICHOlas Young, a bankrupt.

This cause having been argued at the present term before the Hon. David Davis, associate justice of the Supreme Court of the United States, and taken under advisement, on consideration it is ordered and adjudged by the court now here that the judgment of the said district court in this cause be, and the same is hereby, affirmed, with costs to be taxed against the said plaintiffs in error; and that this cause be, and the same is hereby, remanded to the said district court for such further proceedings as may be had according to law.

And it is further ordered and adjudged that the defendant in error do have and recover of the said plaintiffs in error the sum of one hundred seventy-three dollars and sixty-five cents, his costs and charges in and about said cause in this behalf by him expended, and that he have execution therefor.

On this day, to wit, the 15th day of August, A. D. 1873, said plaintiffs in error, by their attorneys, Messrs. Gregory and Pinney, filed in the said court in said entitled cause their bond on writ of error, which said bond is in the words and figures following, to wit:

39 Supreme Court of the United States.

HARRY FOX, WILLIAM B. HOWARD, JOHN Wheat, and Clark Lipe, plaintiffs in error,
vs.
EDWIN W. GARDNER, AS ASSIGNEE IN BANKruptcy of Nicholas Young, a bankrupt, defendant in error.

Know all men by these presents that we, Harry Fox, William B. Howard, John Wheat, and Clark Lipe, and Ja's E. Miller, of Chicago, Ill's, and O. B. Green, of Chicago, Illinois, are held and firmly bound unto

Edwin W. Gardner, as assignee in bankruptcy of Nicholas Young, a bankrupt, of Lodi, Wisconsin, in the sum of eleven thousand dollars, to be paid to the said Edwin W. Gardner as such assignee, his successor or successors, executors, or administrators; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 13th day of August, A. D. 1873.

Whereas the above-named Harry Fox, William B. Howard, John Wheat, and Clark Lipe, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the above-named Harry Fox, William B. Howard, John Wheat, and Clark Lipe shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue

HARRY FOX. [SEAL.]
W'M B. HOWARD. [SEAL.]
JOHN J. WHEAT. [SEAL.]
C. LIPE. [SEAL.]
JA'S E. MILLER. [SEAL.]
O. B. GREEN. [SEAL.]

Sealed and delivered this 13th day of August, 1873, in presence of—

(Endorsed:) The within bond and sureties approved.

J. C. HOPKINS,
U. S. Dis't Judge.

On this day, to wit, the 16th day of August, A. D. 1873, said plaintiffs in error, by their attorneys, filed in the said court, in said entitled cause, their citation on writ of error, as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

To Edwin W. Gardner, as assignee in bankruptcy of Nicholas Young, a bankrupt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein Harry Fox, William B. Howard, John Wheat, and Clark Lipe, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned shall not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable James C. Hopkins, judge of the district
40 court of the United States for the western district of Wisconsin, this 13th day of August, in the year of our Lord one thousand eight hundred and seventy-three.

J. C. HOPKINS,
District Judge of the United States for the Western district of Wisconsin.

(Endorsed:) Service admitted August 16th, 1873.

W'M F. VILAS,
Attorney for Def't in error.

WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom; and also a true copy of the security on the writ of error and the original citation and service thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office, in the city of Madison, this 2d day of October, A. D. 1873, and of our Independence the ninety-eighth year.

[SEAL.] F. M. STEWART, *Clerk.*

(Indorsement on cover:) No. 227. Harry Fox, William B. Howard, John Wheat, and Clarke Lipe, plaintiffs in error, vs. Edwin W. Gardner, assignee of Nicholas Young, a bankrupt. W. Wisconsin, C. C. U. S. Filed 11th October, 1873.

Supreme Court of the United States.

No. 227.

HARRY FOX *et al.*, PLAINTIFFS IN ERROR,

vs.

EDWIN W. GARDNER, ASSIGNEE, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

B. G. CAULFIELD,
R. T. MERRICK,
Of Counsel for Plaintiffs in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 227.

HARRY FOX *et al.*, PLAINTIFFS IN ERROR,

vs.

EDWIN W. GARDNER, ASSIGNEE, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Brief on behalf of Plaintiffs in Error.

The plaintiffs in error, under the partnership name of Fox and Howard, were railroad contractors on a portion of the Chicago and Northwestern Railway. The defendant in error is the assignee in bankruptcy of one Nicholas Young, a sub-contractor under them. The contract between Young and the plaintiffs provided for payments to be made to the former "upon the monthly estimate of the engineer in "charge of said work, on the 15th day of each and every "month, for the work done during the preceding month, "reserving fifteen per centum from each estimate until the "completion of said work and fulfilment of this contract; said "payment to be made as follows: To the laborers employed "in doing said work to the extent of the amount ascertained "to be due them for such services, and the balance of such "estimate to be paid to the said party of the second part, "(Young.)"

See Record, page 8.

The contract was made October 4, 1870; the work was finished about November 24, 1870; and full payment became due on December 15th, 1870. Subsequently, Young was adjudged a bankrupt in pursuance of a petition in bankruptcy filed against him on the 7th of January, 1871; and on the 12th of September, 1872, the defendant in error, as his assignee, instituted the proceedings which are now before this court for review, to compel the payment of an alleged balance due from the plaintiffs in error to Young.

Under the rulings of the District Court, which were affirmed by the Circuit Court, the jury rendered a verdict in favor of the assignee for the sum of $4,691.47, of which the principal items were $3,692.80 claimed by the plaintiffs in error to have been paid by them to the use of Young before the filing of the petition in bankruptcy in pursuance of acceptances by them of Young's order to that amount, (Record, pp. 12, 13, 16,) and $502.20, consisting of orders drawn on Young by various small creditors in favor of one Burroughs, and, as is claimed, with Young's consent, taken by the plaintiffs and charged up against Young and credited to Burroughs before the institution of the proceedings in bankruptcy. (Record, pp. 17, 18, 19.) The main controversy in the case is as to the validity of these payments under the provisions of the bankrupt law of the United States.

Numerous exceptions were taken to the rulings of the District Court, both in respect to the admission of evidence and in reference to the charge of the court and the instructions given, as well as those refused to be given, to the jury. But it is believed that they can all be substantially reduced to the following general heads:

Assignment of Errors.

1. The court below erred in allowing the introduction of testimony tending to show the insolvency of Young about the beginning of December, 1870, when the orders above

mentioned were drawn, and that Fox and Howard accepted the orders with full knowledge of the insolvency, and with intent to give a preference, fraudulent under the bankrupt act.

2. The court below erred in admitting evidence of the amount paid by Burroughs for the orders.

3. There was error in admitting in evidence a bond of indemnity given by Burroughs to the plaintiffs in error on the 28th of February, 1871, to secure them against any demands on the part of the assignee of Young.

4. There was error in the refusal of the court to charge the jury, in accordance with the prayers of the plaintiffs in error, that the insolvency of Young constituted no just ground on the part of the plaintiffs in error to decline to accept his orders or to pay them after having accepted them; even though such acceptances and payments should amount to fraudulent preferences under the bankrupt act as to the creditors of Young who received the benefit of them.

5. There was error in the refusal of the court to instruct the jury that the assignee could not proceed against a creditor of Young for having received the money on these acceptances and at the same time against the plaintiffs in error as though no payment had been made.

6. The court below erred in charging the jury that the 35th section of the Bankrupt Act rendered the aforesaid acceptances void, if Young was insolvent when they were given, and the plaintiffs in error and the parties to whom they were given, were then aware of his insolvency.

7. There was error in the ruling of the court that if, in accordance with the rulings already made, the plaintiffs in error were guilty of a fraud upon the bankrupt act by their acceptances, they were not even legally liable to the creditors.

8. There was error in the ruling of the court that, if the plaintiffs in error acted with full knowledge of Young's insolvent condition, the acceptances were wholly void.

9. The court erred in admitting, upon the cross-examination of witnesses, testimony not pertinent to any matters brought forth in the direct examination.

10. The court erred in admitting testimony as to the insolvency of Young, when no fraud or collusion on the part of the plaintiffs in error had been charged in the complaint of the assignee.

BRIEF.

I.

It is respectfully submitted that the court below was mistaken in its construction of the 35th section of the Bankrupt Act. That section does not authorize suits by an assignee against debtors of the bankrupt who have discharged their debts to him, or paid money to other persons for his use, within the period of four or six months specified in the act. It only authorizes suits against such creditors of the bankrupt as have fraudulently received such payments. Only the parties *benefitted* by a fraudulent preference under the bankrupt act are liable to the assignee.

The doctrine of the District Court leads to the most disastrous consequences. For if a debtor cannot respect the orders of a man in embarrassed circumstances except at his peril, then he will necessarily precipitate the condition of insolvency and bankruptcy which a different course might have prevented. It is believed that this doctrine is contrary to common justice and the established principles of law.

Adler *vs.* Fenton, 24 Howard, 407.
Simpson *vs.* Dall., 3 Wallace, 460.

II.

The admission of testimony upon cross-examination which was not called for by any matter brought out in the direct examination, was clearly erroneous. This court has decided, in accordance with long-established principles, that "the right to cross-examine a witness is limited to matters stated in his direct examination."

Houghton *vs.* Jones, 1 Wallace, 702.
Trenton R. R. Co. *vs.* Stimpson, 14 Peters, 448.

For these and other reasons apparent on the recerd, the plaintiffs in error respectfully submit that the judgments of the Circuit and District Courts should be reversed.

B. G. CAULFIELD,
R. T. MERRICK,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States

NO. 227.

HARRY FOX, WILLIAM B. HOWARD, JOHN WHEAT AND CLARK LIPE, PLAINTIFFS IN ERROR.

VS.

EDWIN W. GARDNER, ASSIGNEE OF NICHOLAS YOUNG, A BANKRUPT, DEFENDANT IN ERROR,

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE DEFENDANT-IN-ERROR.

WM. F. VILAS,
Counsel for Defendant in Error.

Supreme Court of the United States

NO. 227.

HARRY FOX, WILLIAM B. HOWARD, JOHN WHEAT AND CLARK LIPE, PLAINTIFFS IN ERROR.

VS.

EDWIN W. GARDNER, ASSIGNEE OF NICHOLAS YOUNG, A BANKRUPT, DEFENDANT IN ERROR,

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE DEFENDANT-IN-ERROR.

STATEMENT OF THE CASE.

THIS ACTION was brought by the defendant-in-error in the District Court of the United States for the Western District of Wisconsin, where he obtained a verdict and judgment for $4,691.47 damages, besides his costs. To this judgment a writ of error was prosecuted in the Circuit Court for the same district, which resulted in an affirmance.

This suit is to reverse both of these determinations.

In the bill of exceptions, settled in the District Court, forty-four exceptions were allowed, and all the rulings to which

these were taken were assigned for error in the Circuit Court. No assignment of errors is filed in this court; but, it is supposed, the same grounds for a reversal will be pressed now which were assigned in the circuit.

A half-dozen exceptions, at most, would have preserved every material question involved in the record; and therefore, without reviewing the several exceptions, a statement of the questions will be drawn and the argument addressed to them abstractly.

THE PLAINTIFFS-IN-ERROR were partners under the firm name of "Fox & Howard," and were contractors to grade a railroad from Madison to Baraboo, in Wisconsin.

October 4th, 1870, they contracted in writing with the bankrupt (see trans. pp. 7, 8.) for his doing a part of the work, called "Section Fourteen," in and near the village of Lodi; agreeing to pay 22 cents per cubic yard for earth excavated; payments to be made as follows: "To the laborers "employed in doing said work, to the extent of the amount "ascertained to be due them for such services, and the bal-"ance" to the bankrupt.

November 24, 1870, the work was completed by the bankrupt under his contract: and he was financially ruined.

January 7, 1871, his creditors filed the petition in bankruptcy, upon which adjudication followed, and the defendant-in-error became assignee of his estate. The assignment was made February 14, 1871.

THE ASSIGNEE SUED upon three causes of action:

First. Upon the contract, alleging to have been earned by the bankrupt for earth and rock excavated at agreed

prices,..... $19,569.34
and conceding payment to bankrupt of $15,485.66
and to himself of..... 527.16
16,012.82

he claimed a balance of..... $3,556.52
besides interest.

Second. For alleged "extra" work, done by the bankrupt at the request of Fox & Howard on other portions of the road,..... $1,100.00

Third. For other "extra" work, at like request, and for tools and materials sold, according to an account, (see record, p. 8) he claimed, with interest, a further sum of $456.50.

THE DEFENSES to these claims, by the plaintiffs-in-error, may be most conveniently for present purpose, stated in an inverse order.

To the *third* cause of action, they answered by admitting having been indebted to the extent of $372.75, and denying the residue; but pleaded payment, as hereinafter stated, of the sum so conceded.

To the *second* cause of action, they pleaded a flat denial, averring that the work claimed as "extra," was embraced within, and paid for according to the contract.

In their general verdict, the jury appear to have found something upon these causes of action in favor of the assignee. But *no exception* in any manner relates to them, and the verdict concludes these defenses.

To the *first* cause of action, the defense, as appearing in proof as well as pleading, may be stated as follows: they

admit the liability at the sum claimed,..... $19,569.34
and in addition, upon the third count..... 372.75

Making a total of..... $19,942.09
Deducting the payments admitted..... 16,012.82

Leaves a remainder of..... $3,929.27

To which they pleaded payment to the bankrupt before bankruptcy; and this, they sought to prove, in three different items or accounts:

1. By tools and materials furnished to bankrupt on account, to the amount of $125.

2. By retaining under the contract to meet alleged unpaid claims for labor, $111.47.

3. By the acceptance of the bankrupt's drafts on them to his creditors, and by charging to him on account, by his direction, drafts drawn by other creditors on him, before his bankruptcy, to the amount of $3,561.64.

(There remained a balance of a few dollars, not met by their case—through some mistake.)

The pleading does not specify these three items of payment, but avers generally payment to the bankrupt before bankruptcy, and to the assignee since in full, except that it is alleged that the $111.47 was reserved to pay unpaid laborers, and has since been paid accordingly.

In Reply, by evidence, to these three points of proof, the defendant-in-error claimed, and endeavored to show,

1. To the claim of payment by account for tools; that *in fact* none such had ever been delivered to the bankrupt. (See record, p. 19.)

No exception arises upon this part of the defense.

2. As to the amount retained ($111.47), that *in fact* no

laborer remained unpaid under the contract, and none was entitled to that sum or any part of it.

See Transcript, p. 19.

Two exceptions relate to this matter.

3. The chief controversy of law arises upon the assignee's reply to the claim of payment by the alleged acceptances of drafts and orders on the bankrupts account.

These are of two sorts.

a. Four drafts or orders, made by the bankrupt on Fox & Howard, in favor of four several creditors, Burroughs, McCloud, Knuteson, and Pruyn & Son. These were given from the 1st to the 3d of December, 1870, after the bankrupt's work was completed, for debts previously contracted to the several payees, and were accepted in writing by Fox & Howard, with a qualification that the amount should prove to be due. It will be observed that the acceptances were not negotiable. During the same month Knuteson transferred his acceptance, without recourse, to Burroughs; and Pruyn & Sons transferred theirs to McCloud. The total amonnt of the four was $3,159.44.

See Transcript, pp. 12, 13, 14.

b. There are five bills which we have called boarding house orders, drawn by as many several creditors of the bankrupt upon him, in favor of Burroughs; (except that one was drawn by bankrupt on Fox & Howard, but not accepted in writing, and for convenience classified with the others.) These drafts amount to $502.20. It was claimed by plaintifls-in-error that after Burroughs bought the several debts represented by them, they, by the bankrupt's verbal direction, on the 1st of December, charged the sum of them to him upon his account in their books, and credited them to their account called "company acceptances," and agreed verbally with Burroughs to pay the amount to him. And

that thereby they became as completely liable to pay Burroughs as upon the written acceptances, and as fully, also, discharged their obligation to the bankrupt, Young. That the novation was as perfect and obligatory in the one case as the other.

This result as to this class of orders, the assignee disputed on the trial. (1.) Because the statute of Wisconsin invalidates any acceptance of a bill not in writing; (R. S. 1858, chap. 60, sec. 7; 1 Tay. Stat., 835); (2.) Because *in fact*, as he claimed and gave evidence tending to prove, no such assent or acceptance was given by the bankrupt, and they were not so charged on the books of plaintiffs-in-error, as claimed by them.

See Transcript, pp. 21–29.

To the rulings on this minor controversy several exceptions were taken; the 12th, trans. p. 24; the 30th, 31st, p. 29; the 32d and 33, p. 30; but inasmuch as the result of the trial was such that all the acceptances were disallowed as payments, upon an objection fatal to these if fully accepted, these exceptions are now immaterial and need no further consideration.

At the time of the bankruptcy, Burroughs held of these alleged acceptances all but two, which belonged to McCloud. The latter have never been paid, but were surrendered by McCloud to plaintiffs-in-error, until they could be paid without hazard of a suit by the assignee.

See receipt in Trans., p. 21.

The orders held by Burroughs were, on the 28th of February, 1871, taken by the plaintiffs-in-error in exchange for a stock of merchandise, upon his indemnifying them against the claim of the assignee, they having then knowledge of his appointment and claims on them.

See Trans., pp. 20 and 21.

To defeat the defense of payment by these acceptances, the defendants in error proved to the satisfaction of the jury, that when the bankrupt gave the drafts he was hopelessly insolvent, that such insolvency was then known to each creditor who obtained such draft, and to the plaintiffs-in-error; that they were given by bankrupt with intent to prefer, and received by the several creditors, and accepted by plaintiffs-in-error colluding with the creditors, in fraud of the bankrupt act.

And upon this proof claimed, that the alleged novation by thus substituting the bankrupt's creditors as their creditors in his stead, could not protect the plaintiffs-in-error as a payment of their debt to the bankrupt, and a discharge of them by him before bankruptcy.

1. For the reason that however binding it might have been on him individually, it was not payment in fact, and was, as a contract of novation, void in law as against the assignee, the proceedings being commenced within four months; because in violation of the law prohibiting fraudulent preferences, and that the plaintiffs-in-error having colluded with the preferees, became parties to the fraud, and had no standing in court to maintain the validity of the transaction.

2. Because, even if the plaintiffs were not parties to the fraud in its inception and in accepting the drafts, yet at the time of the bankruptcy they held a fund belonging to the assignee, his right to which they cannot resist by asserting an obligation to pay it to another whose only claim to have it is void in law, and who must in turn render it himself to the assignee; nor, that with knowledge of the assignee's demand and of his right, they have, after bankruptcy, defiantly delivered the fund to such other person, upon indemnification.

The District Judge sustained only the first proposition, and required the defendant in error to make such proof as should satisfy the jury that Fox & Howard were parties to the fraud; the proof of which point sustains both.

THE PLAINTIFFS-IN-ERROR RESISTED the points above made, besides disputing the facts, by objecting:

1. That it was incompetent for the defendant in error to give such proof under the pleadings.

2. That the proposition as stated and given by the court in charge to the jury, is not the law; and

3. By a claim that the debts so preferred were due from plaintiffs-in-error *directly* to the several creditors, who received the acceptances, without any intervention on the part of Young being necessary, and hence without any fraudulent preference by him of such creditors; and to support this REJOINED with proof that the several so-called debts against Young, for which the written acceptances were given, were in fact made up of items for goods and merchandise furnished to various laborers on Young's work, upon his written orders, directed to and requesting those several creditors respectively, who were merchants in Lodi, to furnish the same to such laborer; a specimen of which orders is affixed to the bill of exceptions as exhibit "B;" (see Transcript, p. 41); that such goods being so furnished were charged to Young on account, and Young deducted the amount so furnished from the pay of such laborers respectively, upon his pay rolls, they having taken his "goods" orders in payment *pro tanto*, and that Fox & Howard paid the laborers, under the contract above referred to, the remaining sum due each severally in money; and that early in October defendants gave Burroughs and McCloud their verbal assurances, that if they should sell to Young, upon

such orders, goods for his laborers, and should obtain from Young at the end of each month a draft on them for the whole amount of such orders, they would accept and pay them so far as they had his money or owed him.

See Transcript, pp. 16, 17.

Whereupon the legal consequence was maintained, that by the contract Fox & Howard became indebted to the laborers directly to the amount of their work, not, however, exceeding in all the contract price, and bound to pay them instead of Young; and that by virtue of that fact that the goods delivered on the orders of Young went to discharge the indebtedness to the laborers, "it was simply an "indirect way of paying the labor indebtedness, "which they were bound to pay to the laborers "or their assignees, and the parties obtaining the accept- "ances by this course of dealing, became subrogated to "and stood, in respect thereto, in the place of these labor- "ers. Fox & Howard had, by their contract with Young, "obliged themselves to pay Young by paying these claims."

THE DEFENDANT-IN-ERROR, on his part, disputed the legal consequence, claimed from the facts as proved; and also proved, that in fact the debts to the creditors of the bankrupt, for whose benefit this suit is prosecuted, were in considerable part contracted in the same way; so that the creditors preferred had no superior claims, but were of the same class with the others.

It thus appears that the capital questions in the case relate to the right of an assignee in bankruptcy to maintain, that the acceptance within four months before bankruptcy of the bankrupt's draft for the debt sued for, cannot avail as a defense, if given to a creditor whom the bankrupt has fraudu-

lently preferred to the defendant's knowledge, or by his collusive aid; the other exceptions relating to points of no difficulty, or of minor importance.

I.

A defendant to a suit by an assignee in bankruptcy to recover an acknowledged debt, cannot establish the defense of payment, by showing his acceptance before bankruptcy of a draft or bill drawn upon him by the bankrupt in favor of a creditor, when it is found that the transaction took place within four months before the petition was filed, that the bill was drawn by the bankrupt, received by the creditor and accepted by the defendant, in collusion, with a common knowledge of the drawer's insolvency, and the common purpose to give such creditor a preference in fraud of the provisions of the bankrupt law, that no payment was in fact made before bankruptcy, and that the acceptance was not negotiable or yet remains in the hands of the original parties.

It will be observed that no denial is here made of the right of a debtor *to pay* his debt to his creditor, at any time before the latter's bankruptcy; and also, that it is not disputed that a valid agreement to substitute for his creditor, another person as creditor, may be pleaded by a debtor to a

suit by the former, or in his right alone, as a discharge of the debt in the nature of payment, and under that plea; which admissions, for argument's sake, will serve to distinguish at the outset much which has heretofore been urged against the case of the defendant-in-error, and which doubtless will be repeated.

The argument which maintains our proposition, is not farfetched or intricate, but a simple application of familiar principles.

A. The novation, or contract of substitution of one creditor for another, is not payment in fact. It is merely a tripartite agreement by which the claim of the first creditor is discharged, and his right and the debtor's obligation made over to another. It is therefore a discharge or legal payment only when the contract is valid and binding upon the first creditor.

The assignee is now such first creditor, by representation; and his representation being not alone of the bankrupt, but of his creditors, he has rights superior to those of the bankrupt. He may attack fraudulent preferences which the bankrupt could not. A contract in favor of a creditor may be binding on the bankrupt, and void as to his assignee.

So it is here. This contract of substitution may have been binding upon the bankrupt. It is now asserted that it is not binding on his assignee, because it was a contract to accomplish a result prohibited by law, a result liable to rescission in favor of the assignee in bankruptcy, upon condition that proceedings be instituted within a limited time. It was a fraudulent agreement to the injury of the bankrupts general creditors, and it is their injury which gives the assignee his right to defeat it.

The 35th section of the bankrupt act, declares that if a

creditor receives a preferential payment, having reasonable cause to believe it "*in fraud*" of that act, "the same shall be *void*."

B. It is hardly disputed that between the bankrupt's assignee and the creditor, this contract of substitution is void and the latter can have no benefit from it; but it seems to be thought that the third party to it, who equally participated in the knowledge and the fraudulent purpose of the others, has some better standing;—founded apparently upon the notion that his promise of payment to the creditor may be binding at the latter's suit.

It is not so. No principle is better established than that contracts made to accomplish a fraudulent or an illegal purpose, are in law obligatory upon neither party; that courts never lend their aid to enforce claims arising out of such transactions, but leave the parties where they have left themselves; that there is no security for the enforcement of such agreements but the fidelity of the parties, the law of "honor among thieves."

Randall v. Howard, 2 Black, 585.
Hannay v. Eve, 3 Cranch, 242.
Kennett v. Chambers, 14 How. 38.
Bank of the U. S. v. Owens, 2 Pet. 527.
Woodworth v. Bennett, 43 N. Y. 273.
Foote v. Emerson, 10 Vermont, 338.
Griswold v. Waddington, 16 J. R. 438.
Fowler v. Scully, 72 Penn. 456.

The rule is applied with no less rigor and with no different effect, to promises made in the course of a transaction designed to "hinder, delay or defraud creditors." Such agreements are by statute void as against creditors; a stat-

ute that supplied no defect in the common law, which of itself declared the same invalidity.

The courts will uproot all such conveyances and agreements by whatever shift or device accomplished, in order to restore the rights of the defrauded creditor; but at the instance of a party thereto, will neither relieve from any such, if executed, nor enforce any if executory. The Wisconsin Supreme Court have repeatedly applied the rule to executed contracts.

Fargo v. Ladd, 6 Wis. 106, with cases cited in notes to last edition.

Bethel v. Edward Stanhope, *Cro. Eliz.* 810, though poorly reported, seems to have been an early application of the rule to an unexecuted promise or gift.

Upon the same principle rest the cases of the invalidity of promises made to effect frauds by one creditor upon others; as when one secretly obtains a promise of a greater advantage to himself than the others receive in a general composition; or a like promise to consent to a bankrupt's discharge, or to desist from opposition to it; (the latter cases being none the less clear without the express statute to same effect;) and others of similar character.

See citations in 1 *Parsons on Notes and Bills*, 216, Ch. VI.

The case of *Nellis v. Clark*, 20 Wend. 24, and S. C., affirmed in Court of Errors, 4 Hill 424, so perfectly meets the point, and the cases are so fully collected in the opinions of Mr. Justice COWEN and of Chancellor WALWORTH, that to further argue it would be needless repetition.

The bankrupt law declares a new principle of honesty among creditors, that "equality is equity" in the dealings of an insolvent debtor, and that any disposition of his property

within four months of bankruptcy to effect a fraudulent preference shall be void.

A purpose to violate this law is not to be defended as any less illegal or unjustifiable, than to commit another fraud on creditors, nor will an executory agreement made in carrying out a conspiracy to defeat the provisions of it, to accomplish a fraud upon it, find sanctions for its enforcement in a court of justice. No argument can be founded upon a distinction between this fraud as *malum prohibitum* is and such as *malum in se*. In the application of the general principle above stated, at least, that distinction does not obtain. CHURCH, C. J., in *Woodworth v. Bennett*, *supra*, speaks of it as an "exploded distinction."

Bolander v. Gentry, 36 Cal. 105, and *Hanson v. Herrick*, 100 Mass. 323, are instances where defenses based on this principle of the bankrupt law were sustained.

The plaintiffs-in-error would be in no danger, therefore, of a suit by either Burroughs or McCloud upon the acceptances which they held, had they have taken no such steps to guard against loss as the proof showed. Neither of those parties could have maintained an action; nor can McCloud hereafter.

Nor can they apprehend a demand from any innocent holder; since not only were their acceptances not negotiable, but they are in their own hands to await the result of this action.

See Trans. p. 21.

C. It is contended, however, for the plaintiffs-in-error, that the last phrase of the first clause of section thirty-five, works a limitation on the preceding words which declare the transaction *void;* so that it should be read as void between the assignee and preferred creditor only; and, in consequence,

that their promises of acceptance and payment to the drawees of the bills were valid.

This construction is plainly wrong upon the very letter of the statute itself. The denunciation of invalidity is expressly not limited. The act goes farther than to declare the transaction void, not short of it. It grants to the assignee, as the representative of the creditors, from perhaps unnecessary care, a right to pursue the property or its value, which as the bankrupt's representative he might not have had, although the transaction were void. But it was not by any means designed that this statute should be operative in no other action, than one brought by the assignee to recover back the spoil of a fraud on the act, in the creditor's hands alone. The statute enacts a principle of law that will support a defense as well as an action.

Bolander v. Gentry, and *Hanson v. Herrick*, *supra*, are both to this point.

Nor if the law be so read will the consequence follow. The language of the statute against fraudulent gifts and conveyances in general, is similar, declaring them void as against creditors. Yet in such case, the general rule obtains, as we have seen, and the unexecuted promise is none the less incapable of enforcement.

D. The mischief of applying such a construction with such an effect to this statute is well illustrated in the case at bar.

It cannot be gainsaid that had the plaintiff-in-error paid McCloud before the bankruptcy, upon his acceptances, the assignee would upon the facts here found by the jury, have been entitled to have recovered the money from him. Why, except because the transfer of it to him was fraudulent and

void, and gave him no right to have it, but left that right in the assignee?

If then the assignee has the right to this fund, which the plaintiffs-in-error have not paid over, but hold only to render to the party entitled to it, upon what solid reason can they decline to pay their debt to the party entitled to receive it? Is the defendant-in-error, to whom confessedly the fund is to be rendered, to be denied possession when he asks it, only to enable the plaintiffs who participated in a fraud to his injury, to transfer it to that person for whose benefit the fraud was concerted, in order that the assignee may be compelled to sue again and the fund be so exposed to the risk of loss?

Shall he sue the preferred creditor? Not for the money, for he has not that. Yet he must sue within two years. If he cannot demand the money from the party who has it, nor recover it from the one who has it not, and this status be maintained, his right is soon barred, and the conspirators succeed.

This consideration compelled the position assumed by counsel for plaintiffs in the instruction asked by them, to the refusal of which they took their 25th exception; (Transcript p. 27,) by which they claim the assignee should first have sued McCloud to have obtained possession of his acceptances, and thereon have proceeded against these plaintiffs-in-error. The argument simply begs the question. It requires the assignee to ratify a transfer which he disputes because fraudulent. The court will not deny our right in order to relieve the plaintiffs-in-error of fears which are fictitious and hypocritical; nor compel the creditors injured by the fraud to which they were parties, to indemnify them against the possible consequences of their own wrong.

The position assumed in the instruction has something grimly comical in its aspect, moreover, in view of the proof

that the acceptances of McCloud which counsel desired the assignee to obtain and surrender for their protection, were already in the hands of plaintiffs-in-error, there to remain "until such time" as they should be at liberty to pay them "by due course of authority of law."

Transcript p. 21.

The correctness of the principle above contended for being decided, no argument is deemed proper to the point that a payment of the acceptances after the assignee's qualification and demand were known, and in open hostility to his rights, constitutes no objection to his recovery.

II.

The assignment under such circumstances as constitute a fraudulent preference, by an insolvent to his creditor, within four (now two) months before his bankruptcy, of a debt due him from another, conters no title thereto on the preferred creditor; and upon the qualification of an assignee in bankruptcy, the debt, not having been paid, becomes owing to him alone and collectable at his suit; and the payment of it thereafter by the debtor to the preferred creditor, with notice of the facts and of the assignee's claim, is no defense to the latter's action.

This proposition omits any charge of participation by the debtor, in the fraudulent transfer of his debt from the insolvent to his preferred creditor; and if the first point, and all the rulings of the court in giving it to the jury, be sustained, the consideration of this becomes immaterial.

But the record establishes, beyond cavil, that the acceptances in the hands of the creditors were fraudulent preferences; a point conceded by counsel for plaintiffs; the jury found that plaintiffs-in-error, at the time of acceptance, had good reason to believe the bills to be fraudulent preferences; (see Transcript, p. 32); it *was proved* that before the payment to Burroughs of part of the orders, the plaintiffs knew of the defendant-in-error's appointment and of his claim; that the payment was made upon an agreement of indemnity, in conscious disregard of the assignee's rights; and that the remaining acceptances have been before the trial placed in plaintiffs-in-error's hands, without payment, to await the issue of this litigation. (Transcript pp. 20–21.) Notwithstanding the District Court required the additional proof of plaintiffs-in-error's participation in the fraud, upon which theory the case was tried, the defendant-in-error is entitled to here insist upon this point; because, if well taken, the facts are uncontroverted or conclusively established, and his judgment is right, notwithstanding there may have been some verbal or technical error in the rulings upon the trial or the instructions to the jury, touching the former theory, or otherwise. With great confidence, also, because the point was sustained in the Circuit Court.

A. The bankrupt act (section fourteen), expressly vests in the assignee, title to "all the *property* conveyed by the bankrupt in favor of his creditors." A debt against another is as much *property* as a movable chattel; and if conveyed in fraud of creditors may, of course, be recovered at

their instance. The act *vests the title* in the assignee, upon the assignment made to him. No right to receive payment of the debt could remain in the preferred creditor.

B. If the language of section fourteen shall be limited to conveyances in fraud of creditors under other laws than the bankrupt law, then section thirty-five produces the same result upon the title. It declares the transfer or assignment of any part of his property to be void, giving the assignee an action for the thing *in specie.*

Bolander v. Gentry, and *Hanson v. Herrick*, *supra*, are direct illustrations of the effect of this statute to *vest title* in the assignee.

C. It seems to follow inevitably that payment to the preferred creditor who has no title to demand it or discharge the debt, will not release the claim of the assignee, in whom is the *title* to the debt, the right to discharge it on payment, and the right to the proceeds, both at law and in equity as against the preferred creditor; especially if such payment be made with knowledge of all the facts.

D. The debtor can complain of no injury or hardship from the application of this rule. There is no risk of harm to him, if he conduct with prudence and fairness.

The preferred creditor cannot maintain an action against him. McCloud cannot sue Fox & Howard. First, because he was a party to a fraud on the law, and the maxim, *ex dolo malo non oritur actio*, defeats him. Its application is all the stronger for their defense, if they were not participants in the fraud, since it is not their share in it, but *McCloud's guilty participation* which will defeat his action. No favor is designed to be shown the defendant; it is the condemnation of a law-breaking plaintiff, which is expressed in the rule, *In pari delicto potior est conditio defendentis.* How much more favorably stands the case of that defend-

ant who resists the plaintiff's claim for illegality, having no confession of equal guilt to make? Secondly, because although title may be said to have passed by the bankrupt's transfer, conditionally perhaps, yet by the adjudication of bankruptcy and the assignment to the assignee, the title is by law re-transferred to him, and none remains in the preferred creditors.

Again, the debtor may at once relieve himself from risk of loss by interpleading the preferred creditor and the assignee, as contestants for the fund he holds. It was not necessary for these plaintiffs-in-error to have taken the initiative. The statutes of Wisconsin regulating the practice in actions at law, under which the District Court proceeded, make provision that in such cases, the debtor being sued by one claimant, may discharge himself by bringing the money into court and obtaining an order to substitute the other claimant in his stead.

R. S. of Wis., 1858, sec. 22, chap. 122; 2 Tay. Stat., 1420.
Fletcher v. Troy Savings Bank, 14 How., Pr. R., 383.
McKay v. Draper, 27 N. Y., 256.

E. The remarks in relation to the mischief of a contrary rule, made in discussing the first point, have equal applicability, to support the propositionnow asserted, and need not be repeated.

It is respectfully submitted that the defendant-in-error was put to the proof of his case under a harder rule than the legal exigency demanded, and that having so established it, he may retreat to his second line, with security, if there be any weak spots developed by the attack upon the first.

III.

The pleadings were sufficient to admit all the proofs produced by the defendant-in-error.

The case was begun after the practice act of Congress, approved June 1, 1872, was in force, by section five of which, the pleadings were required to conform to the practice in Wisconsin.

By that system of pleading, in common law actions, the complaint should contain substantially the same matters which would have been embraced in a declaration under the old practice.

The defendant answers as he would have pleaded at law, before the general issue destroyed special pleading, by way of traverse or confession and avoidance. And there the *pleading* terminates. By proof, however, the plaintiff may, as formerly at law by his replication, traverse or avoid the defendant's defense by way of confession and avoidance. The mutual altercation terminates in the pleading at the second stage, but may continue to any point in the proof.

R. S. of Wis., 1858 Chap. 125, Sec. 32; 2 Tay. Stat. 1445.
Roys v. Lull, 9 Wis., 324.
Esselstyn v. Weeks, 12 N. Y., 635.

The action was brought to recover a debt due to the bankrupt. The defendant pleaded payment; a defense by way of confession and avoidance which he was bound to so plead.

Martin v. Pugh, 23 Wis., 184.
Hawes v. Woolcock, 30 ib., 213.

There the pleading properly terminated. When the trial came on plaintiff below was at liberty to defeat the plea of payment by any such proof as tended to that end. Had the

former practice have prevailed, the pleading would have been even briefer. Plaintiffs in-error have suffered no injury.

The points above discussed relate to the rulings of the District Court to which exceptions numbered from 1 to 9 inclusive, 13 to 21 inclusive, 24, 25, 27, 34 to 43 inclusive were taken; and it is respectfully submitted, serve to justify the decision of the court. As to some of them other reasons to the same end will readily suggest themselves on perusal.

Respecting the instruction to which the 35th exception was taken, it should be observed that there is some omission in the record, as will be apparent from reading the comments of the district judge immediately following. The instruction was asked by counsel for plaintiffs-in-error, submitted in writing, and finally withdrawn as an instruction requested, but still given by the court in connection with his own.

IV.

Neither of the preferred creditors acquired any claim against Fox & Howard by reason of the fact, that their accounts against Young, the bankrupt, were composed of orders for goods, which he had given on them to laborers, in payment of his debt to them.

A. Fox & Howard were not by the contract liable to the laborers directly. The contract language in respect to the mode of payment amounted merely to giving authority to them to so pay their debt to Young at their election. When made there were no definite individuals included under the term laborers, nor debts due them. To have rendered them bound to pay any laborer or any body of them, they must have given their promise to such person or persons, under this authority.

Balliett v. Scott, 32 Wis. 174.

Young employed all the workmen and he alone contracted to pay them. Had Fox & Howard have been liable to pay their claims, Young need not have been a bankrupt.

B. Granting Fox & Howard's liability to individual laborers, yet the merchants who sold goods on Young's orders, thereby obtained no assignment *pro tanto* of his claim on them.

See form of order used, Trans. p. 41.

If a debt could be so broken and distributed, the plaintiffs-in-error might well cry out against the law; their business excellently illustrating the disastrous consequences, which would flow from the doctrine their counsel contend for.

The merchants trusted Young, charged him upon account for goods sold, and with no reference to Fox & Howard or proven knowledge of the contract. The order does not even indicate that payee was a laborer or that the amount was to be applied on his wages.

The verbal assurances to Burroughs and McCloud, spoken of as in some vague way affecting the principle, were but promises to accept *Young's orders*, if they got them, and there was money left!

C. The argument for plaintiffs proves too much. Most of the bankrupt's creditors who have proved their claims, retail dealers in Lodi, contracted their accounts in the same manner, and either plaintiffs-in-error are liable to all in full, or Burroughs and McCloud are in the same class without right to preference.

Execptions numbered 10, 22, 23 and 29, Transcript, pp. 23, 27, 29, are covered by this point.

V.

Other exceptions of lesser consequence were pressed on the argument in the Circuit Court, and it is proper to call attention to the record concerning them.

The 11th and 28th exceptions, (trans. pp. 23 and 28), were to a refusal to instruct, and to an instruction given, respecting the claim of plaintiffs-in-error to *withhold* $111.47, under plea of *payment*, because they claimed there were laborers unpaid. The propriety of the rulings is apparent from the proof given by the assignee that no laborer remained unpaid.

Transcript, p. 19.

26th Exception—Trans. p. 28—was to the denial of an instruction prayed, to the effect that the assignee had lost his right to recover this debt of Fox & Howard, because he

had once filed a petition in the court in bankruptcy with a view to proceed against Burroughs as a preferred creditor. No offer was made to show that any process thereon was ever sued out against Burroughs, or that any subsequent steps whatever were taken; and the proceeding was without jurisdiction and void.

Smith v. Mason, 14 Wall. 419.

Other exceptions may be pressed by counsel for plaintiffs-in-error, but I forbear extending the brief to greater compass, believing that nothing can be urged as material error within the general doctrines of this court, which is not already sufficiently considered. The case is respectfully submitted with the prayer of the defendant-in-error for an affirmance of his judgment.

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